SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No.

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, Appellant,

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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TRANSCRIPT OF RECORD.

PROCEEDINGS of the District Court of the United States for the Western District of Kentucky, at a regular term begun and held at the Federal Court Hall in the City of Louisville, on Monday, October 13, 1919.

PRESENT: HON. WALTER EVANS, District Judge.

BE IT REMEMBERED that heretofore, to-wit: on October 10, 1919, came the plaintiff herein, by Levy Mayer, Esq., and Wm. Marshall Bullitt, Esq., Counsel, and filed in the Clerk's office of said Court, its Petition in Equity in the above entitled cause, which Petition in Equity is in words and figures, as follows, to-wit:

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - *Plaintiff,*

vs. **Petition in Equity.**

ELWOOD HAMILTON, Collector of Internal Revenue for the Fifth Collection District of Kentucky, *Defendant.*

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE.

The plaintiff, the KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, states as follows, to wit:

(1) That the KENTUCKY DISTILLERIES & WAREHOUSE COMPANY is a corporation created on and organized and existing since February

3rd, 1899, under the laws of the State of New Jersey and is a citizen of that state, and has its principal office and residence at Jersey City, New Jersey; that it has $32,000,000 paid up and issued capital stock and since February 3rd, 1899, has under its charter (except as it has been interfered with by certain pretended laws of the United States) been engaged in the business of distilling, manufacturing, storing, distributing, buying and selling whiskey, alcohol, high wines and other distilled spirits for beverage purposes, and owning, operating and maintaining a large number of registered distilleries, bonded warehouses, bottling plants and other properties in Kentucky and elsewhere necessary for the conduct of its business; that the defendant, Elwood Hamilton is a citizen of the State of Kentucky and a resident of Louisville in said state, and is the United States Collector of Internal Revenue for the Fifth Collection District of Kentucky.

(2) That this is a suit of a civil nature in equity between citizens of different states, and arises under the Constitution and laws of the United States, and particularly under the FIFTH AMENDMENT to the Constitution, the Internal Revenue Laws of the United States and an Act of Congress approved November 21, 1918, entitled *"An act to enable the Secre-*

tary of Agriculture to carry out during the fiscal year ending June 30th, 1919, the purposes of the Act entitled 'An Act to provide further for the National security and defense by stimulating agriculture and facilitating the distribution of agricultural products', and for other purposes," and which Act is hereinafter called "War Prohibition Act", and this is a suit to compel the defendant to permit the plaintiff to pay the taxes on and withdraw certain whiskey from bond for sale in the United States for beverage purposes.

(3) That on November 21, 1918, there was enacted by Congress and approved by the President of the United States the said War Prohibition Act; that said Act contains the following provision:

> "That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the manpower of the nation and to increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export."

That under the provisions of said Act the Commissioner of Internal Revenue and all Collectors of Internal Revenue acting under his authority and direction, including the defendant, have on and since July 1, 1919, refused to permit the withdrawal of any distilled spirits from bonded warehouses for beverage purposes in the United States and are now refusing and will continue to refuse to permit such withdrawal except for export, unless otherwise directed by lawful authority.

That the aforesaid provision of the said War Prohibition Act is illegal, void and unconstitutional in that it operates (as hereinafter set forth) to take plaintiff's private property for public use without just compensation; that the FIFTH AMENDMENT to the Constitution of the United States provides that:

> * * * "Nor shall private property be taken for public use without just compensation."

That the plaintiff's property has been and is now being taken under the terms of said War Prohibition Act for public use, within the meaning of said FIFTH AMENDMENT, without just compensation or any compensation whatsoever being made therefor to the plaintiff; nor does said Act contain any machinery

or provision for ascertaining or awarding any compensation to plaintiff for its said private property which is so being taken under the terms of said Act.

(4) That the plaintiff is now, and for more than to wit, four years last past has been the owner, either in its own name or in that of Julius Kessler & Company, (a subsidiary branch of plaintiff), a corporation organized under the laws of West Virginia, whose entire capital stock is owned by the plaintiff, of at least 22,157 barrels of whiskey, containing according to the original official gauge, 1,091,253 proof gallons; that of said 22,157 barrels, 8,485 barrels contain 412,016.58 proof gallons according to the original official gauge, and were manufactured by the plaintiff more than to wit, four years ago, and were then and always have been and are now owned and were originally entered into by and now are in U. S. bonded warehouses in the name of the plaintiff; that the balance of said 22,157 barrels of whiskey, or 13,672 barrels, contain 665,240.77 proof gallons, according to the original official gauge and were manufactured by said Julius Kessler & Company more than to wit, four years ago, and were then and always have been and are now owned and were originally entered into by and now are in U. S. bonded

warehouses in the name of said Julius Kessler & Company; that the actual value and cost to the plaintiff of said 8,485 barrels of whiskey was on November 21, 1918, and for a long time prior to said date had been in excess of $400,000 and the actual value and cost to said Julius Kessler & Company of said 13,672 barrels of whiskey was on November 21, 1918, and for a long time prior to said date had been in excess of $600,000; that the actual value of all said whiskey (if the wrongs herein complained had not been committed) would be much in excess of $1,500,000, that 17,938 of said 22,157 barrels of whiskey now are and since a date more than to wit, three years prior to November 21, 1918, have been in U. S. bonded warehouses in the State of Kentucky, and the balance of said 22,157 barrels, viz., 4,219, now are and during all of said time have been in U. S. bonded warehouses in the City of Peoria and State of Illinois.

(5) That plaintiff, either in its own name or in that of its subsidiary branches, now owns and continuously since a date more than to wit, three years prior to November 21, 1918, has owned at least 15,964 proof gallons of whiskey in addition to said 22,157 barrels and which 15,964 proof gallons are known as floor stock, and are now on the premises of the

plaintiff and its said branches; that upon said floor stock the U. S. Internal Revenue tax of $6.40 per proof gallon has been heretofore duly paid to the United States by the plaintiff or its said branches; that from 1894 to October 3, 1917, the Internal Revenue tax was $1.10 per proof gallon; that on October 3, 1917, said tax was raised to $3.20 per proof gallon, and on February 24, 1919, said tax was again increased and raised to $6.40 per proof gallon, which is now the statutory tax rate; that on or about September 24, 1919, the plaintiff and its branches were compelled by the United States to and did pay to it $993,630.12 Internal Revenue tax under said law of February 24, 1919; that in said sum there was and is included $51,084.80, being the said increase in Internal Revenue tax paid by plaintiff or its said branches on said 15,964 proof gallons of said floor stock, upon which the said theretofore current tax of either $1.10 or $3.20 per proof gallon had already been paid by plaintiff or its said branches to the United States.

(6) That part and parcel of the said whiskey of the plaintiff so as aforesaid in bond in the State of Kentucky, are 534 barrels of whiskey, 139 barrels of which are branded Elk Run and 395 barrels are branded Mellwood, all of which was manufactured by the plain-

tiff; that of said 139 barrels of whiskey, 14 were on January 14, 1914, and 125 were on March 14, 1914, deposited by plaintiff in the U. S. Bonded Warehouse of Distillery registered No. 368, located in Louisville, Kentucky, in the Fifth Revenue District thereof; that said 139 barrels of whiskey contain, according to the original official gauge, 6,785.44 proof gallons; that of said 395 barrels of Mellwood whiskey, 145 were, in April, 1915, and the other 250 barrels thereof were in May, 1915, deposited by the plaintiff in the U. S. Bonded Warehouse of Distillery Registered No. 34, located in the said City of Louisville in said Fifth District; that said 395 barrels contain, according to the original official gauge, 18,877.47 proof gallons; that said respective portions of said 534 barrels of whiskey are now in said bonded warehouses, respectively; that the actual value and cost of said 534 barrels of whiskey including the tax so as aforesaid paid thereon, was and is in excess of $70,000; and that the present actual value of said 534 barrels of whiskey (if the wrongs herein complained of had not been committed), would greatly exceed said sum.

(7) That there are now in the U. S. Bonded Warehouses owned by the plaintiff 215,846 barrels of whiskey, of which there are (*a*) in

its Bonded Warehouses located in Kentucky, 207,158 barrels of whiskey, containing, to wit, over 10,000,000 proof gallons, according to the original official gauge and (*b*) in the Bonded Warehouses of the plaintiff located in Peoria, Illinois, 8,688 barrels of whiskey, containing, to wit, over 400,000 proof gallons, according to the original official gauge; that the actual cost and value of said whiskey was and is far in excess of $5,000,000; that of said whiskey all but said 22,157 barrels belongs to thousands of individuals, firms, banks and corporations, all or nearly all of whom are residents and citizens of the United States; that the owners thereof purchased the same in various quantities at different times during each of the seven years prior to November 21, 1918, and hold the plaintiff's warehouse receipts which were issued by the plaintiff for and represent said whiskey; that said warehouse receipts are negotiable instruments, and are dealt in and handled as such and pass by endorsement and delivery and that the names of said thousands of owners and holders thereof are unknown to and cannot be ascertained by the plaintiff.

(8) That the plaintiff is and for twenty years last past has been the owner of said warehouses, but the same are by law bonded to the United States and such of said ware-

houses as are in Kentucky are in the possession of and under the direction and control of the defendant and such as are in Illinois are in the possession of and under the direction and control of the Collector of Internal Revenue in said state; that under and pursuant to the law governing such matters the plaintiff, when said whiskey was entered by it, as aforesaid, into bond, was required to and did execute to the United States and did deliver to the respective Collectors of Internal Revenue, in and for the said respective collection districts, its monthly warehousing bonds to protect and insure the payment of the Internal Revenue tax upon said whiskey when the same should be withdrawn from bond; that the total bonded liability of the plaintiff, according to said bonds, is in excess of $10,000,000 and that said bonds are still outstanding and uncancelled.

(9) That the United States declared "That a state of war exists between the Imperial German Government and the Government and the people of the United States" on April 6, 1917; that said war continued with actual combat until November 11, 1918, when an Armistice was officially declared and established; that the United States, through its various departments, on and after the date of said Ar-

mistice, suspended its wartime activities in the production of arms, munitions, ships, food and clothing for the Army and Navy, and since said Armistice has, to a very large extent, disposed of a vast quantity of materials which it had theretofore accumulated for the further prosecution of the war, and it still has a large surplus of such materials which it is now actually engaged in selling to the public; that on July 14, 1919, the War Trade Board Section of the Department of State officially announced the resumption of trade with Germany, and that the Federal Reserve Board simultaneously officially announced the resumption of exchange with Germany; that on July 14, 1919, said War Trade Board Section officially announced that all commodities had been removed from the export conservation list; that there are now no restrictions upon trade between the United States and those countries with which it and the Allied Governments had been at war; that all censorship of postal, telegraphic and wireless communication between the United States and those countries was removed on June 21, 1919, and plaintiff states upon information and belief that demobilization of the armed forces of the United States has been actually terminated; that on November 11, 1918, the President of the United States, in addressing a joint meeting

of the two houses of Congress, after summarizing the terms of said Armistice, said:

> "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German Nation to renew it. * * *
>
> "It is not now possible to assess the consequences of this consummation. We know only that this tragical war whose consuming volume swept from one nation to another until all the world was on fire is at an end";

That the War Department officially declared in a published statement on September 30, 1919, that "in general, the accident of war and the progress of demobilization are at an end"; that the army that served in said war has been so reduced in numbers since said Armistice that over, to wit, 119,000 new recruits have been added to the Army for peace purposes; that according to the best information and belief of plaintiff no activities are being engaged in by the War Department with a view to any further conduct of the process of demobilization which was commenced immediately after the said Armistice, and which has now been conducted to a conclusion, as aforesaid; that the Navy of the United States has been reduced to less than 135,000 men and is smaller in strength than its authorized peace quota; that both the Army and the Navy of the

United States are now engaged in campaigns of enlistment to bring the numerical strength of the two branches up to their authorized peace-time footing; that there is now between the citizens of the United States and the citizens of those countries with which the United States has been at war, a free interchange of communication, business and trade, and money and commodities are being transported from the United States to those countries and from those countries to the United States; that communication by mail, cable and wireless, trade and commerce in money and commodities and general commercial intercourse has been resumed and is now being carried on between the citizens of the United States and the citizens of those countries; and that the production by the United States of arms, munitions, ships, food and clothing for the Army and Navy in connection with said war has completely ceased.

(10) That plaintiff is advised by counsel and respectfully states that the War Prohibition Act has terminated and ceased to be of legal effect; that the President, as plaintiff is informed and believes, and therefore states, has not determined and proclaimed the date of the termination of demobilization for that he has been advised by the Honorable Attorney

General of the United States that such War Prohibition Act, as matter of law, must remain in effect until the ratification of the Treaty of Peace and the exchange of ratifications thereof, and that, even though demobilization had been terminated, the President is not called upon to and should not determine and proclaim the same until the Treaty of Peace has been ratified and the ratifications exchanged, and plaintiff upon information and belief states that because of said advice the President has refrained from making said determination and proclamation and intends to continue to refrain therefrom; that the plaintiff is advised by its counsel and therefore respectfully states that plaintiff is now entitled, without let or hindrance by the defendant, to withdraw its said distilled spirits from bond for sale for beverage purposes in the United States upon plaintiff paying the requisite lawful tax thereon.

(11) That on July 10, 1919, the President of the United States submitted to the Senate the Treaty of Peace with Germany that he had theretofore in cooperation with the representatives of the Allied nations negotiated at Paris, France; that part of said Treaty is the Covenant of the League of Nations; that since said date said Treaty and Covenant have been

under consideration and debate in the Senate; that the Committee on Foreign Relations of the Senate (to which committee said Treaty and Covenant were, on July 10, 1919, referred) has heretofore on September 10, 1919, made a majority report to the Senate recommending the adoption of four reservations to be made a part of the ratification of said Treaty and Covenant; that a large number of amendments and other reservations to said Treaty and Covenant have been introduced in the Senate; that a minority of said Committee, on September 11, 1919, filed a minority report recommending the ratification of said Treaty and Covenant without any amendment, change or reservation whatsoever; that the President has publicly announced that he was determined that said Treaty of Peace with Germany and the Covenant of the League of Nations should be ratified by the Senate without amendment, reservation or change of any kind; that at the time of the filing of this bill of complaint it is impossible to state to what extent, if at all, said Treaty and Covenant will be ratified, and to what extent, if at all, said reservations and amendments will be adopted; that the proposed Treaty of Peace between the United States and Austria-Hungary has not as yet been submitted by the President to the Senate; that to what extent, if at all, said

treaty with Austria-Hungary will be accepted, ratified, changed or amended by the Senate, it is impossible at this time to state; that the plaintiff is informed and believes and therefore states that at least three if not more months will elapse before official ratifications of said Treaty of Peace with Germany and Covenant of the League of Nations and said Treaty of Peace with Austria-Hungary will be exchanged; that plaintiff is informed and believes and states that the time between the date of filing this petition and the date when the Prohibition Amendment hereinafter referred to becomes effective, will have passed before the ratifications are exchanged (if they be ever exchanged) of said proposed Treaties and Covenant of the League of Nations; that the effect of such delay will be to still further impair, if not entirely destroy the property of the plaintiff in its said whiskey; that there are now in U. S. Bonded Warehouses to wit, 69,000,000 proof gallons of distilled spirits according to the original official gauge, all of which were entered into bond long prior to November 21, 1918, and all of which are affected similarly to that of plaintiff, and the actual value of which exceeds, to wit, $75,000,000.

(12) That on December 3, 1917 (eight months after the aforesaid declaration of the existence of said war), Congress adopted and submitted to the legislatures of the several States a joint resolution proposing the adoption of said Amendment to the Constitution of the United States known as the Prohibition Amendment; that said Amendment prohibits the manufacture, sale or transportation within, or the importation into, or the exportation from the United States and all territory subject to its jurisdiction of intoxicating liquors for beverage purposes, one year after the date of its ratification by the States.

That on January 29, 1919, HON. FRANK L. POLK, Acting Secretary of State, issued the following proclamation:

"KNOW YE, That the Congress of the United States, at the second session Sixty-fifth Congress begun at Washington on the third day of December in the year one thousand nine hundred and seventeen, passed a resolution in the words and figures following to wit:

'*Joint resolution*, proposing an amendment to the Constitution of the United States:

'Resolved, By the Senate and House of Representatives of the United States of America in Congress Assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to be-

come valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution.

ARTICLE.

'Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

'Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

'Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.'

"And further, That it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia,

Washington, West Virginia, Wisconsin and Wyoming.

"And further, That the States whose Legislatures have so ratified the said proposed Amendment constitute three-fourths of the whole number of States in the United States:

"Now, THEREFORE, BE IT KNOWN THAT I, Frank L. Polk, Acting Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

"In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

"Done at the City of Washington this 29th day of January in the year of our Lord one thousand nine hundred and nineteen.

(Signed) "FRANK L. POLK,

(Seal) *Acting Secretary of State.*"

That said Prohibition Amendment expressly permits the manufacture, sale, transportation, importation and exportation of intoxicating liquors during a period of one year from the ratification of said Amendment; that according to said proclamation of the acting Secretary of State said one year elapses in January, 1920; that the debates of Congress and the history of the passage of said Joint Resolution by Congress show that said period

of a year was a condition to the passage and a material part of said Amendment; that said War Prohibition Act was as aforesaid passed on November 21, 1918, and by its terms prohibits the withdrawal from bond and the sale of distilled spirits for beverage purposes after June 30, 1919, thus allowing a period of only 8 months and 9 days for such withdrawal and sale and therefore is in conflict with said one year provision of said Amendment.

That under said continued enforcement of the War Prohibition Act, even though it should be ultimately suspended in its operation by proclamation by the President of the United States, shortly before January, 1920, plaintiff would be unable thereafter and before the taking effect of said Prohibition Amendment, to remove from bond and sell its said distilled spirits in the United States for beverage purposes; that said War Prohibition Act as now enforced by the defendant, constitutes an irremediable taking of plaintiff's property without just compensation.

(15) That the plaintiff has duly caused the contents of said 534 barrels of whiskey to be officially regauged by the defendant on October 9, 1919, for tax-payment; that the plaintiff on October 10, 1919, and before the filing of this petition, made to the defendant proper,

due legal tender of $132,331.52, which is the total lawful tax money due the United States on said 534 barrels of whiskey, and asked leave to withdraw from bond in order that the plaintiff might sell the same in the United States for beverage purposes (1) the said 534 barrels of whiskey above described, consisting of 139 barrels branded "Elkrun" and heretofore deposited and now on deposit as aforesaid in said United States Bonded Warehouse of Distillery registered No. 368, located in Louisville, Kentucky, and (2) the said 395 barrels of whiskey branded "Mellwood" heretofore deposited and now on deposit as aforesaid in said United States Bonded Warehouse of Distillery registered No. 34 located in said City of Louisville; but the defendant has refused, and declared that he will continue to refuse, to accept said tax money and to permit the withdrawal by plaintiff of said whiskey from bond for purposes of sale in the United States for beverage purposes, and plaintiff states that the defendant will continue such refusal unless ordered to permit such withdrawal of said 534 barrels of whiskey by the plaintiff from bond and such sale by it in the United States for beverage purposes by the process of this Honorable Court.

WHEREFORE, the plaintiff prays that the Court by its decree:

FIRST: Declare unconstitutional, illegal and void so much of said War Prohibition Act as provides as follows:

> "That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man-power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export."

SECOND: Restrain the defendant and all others acting under his authority or in association with him, from interfering with the usual process in the withdrawal, distribution, disposition and sale for beverage purposes in the United States of plaintiff's said 534 barrels of distilled spirits now in bond as aforesaid.

THIRD: Restrain the defendant from refusing to receive the application of this plaintiff for the withdrawal of any or all of said 534 barrels of whiskey from the said bonded

warehouses under his control and direct the defendant to accept from the plaintiff the said tax money so as aforesaid tendered by the plaintiff for such whiskey and to do all and sundry things necessary to be done by him, his officers and agents, to release said distilled spirits to the plaintiff for sale by it in the United States for beverage purposes.

FOURTH: Declare that the said War Prohibition Act has ceased to operate in so far as it affects or denies or restricts or interferes with the removal by the plaintiff from bond and sale by it in the United States for beverage purposes of said 534 barrels of whiskey or any other part of said 22,157 barrels of whiskey, and also in so far as it denies or restricts or interferes with the sale by the plaintiff in the United States for beverage purposes of said 15,964 proof gallons of floor stock whiskey.

FIFTH: Grant a temporary injunction or other appropriate relief as above prayed to the end that plaintiff may be immediately restored to the use and benefit and the right of withdrawal from bond and sale in the United States for beverage purposes of its said 534 barrels of whiskey pending the final hearing of this cause.

SIXTH: Grant such other and further relief as may be meet and proper in the premises.

MAY IT PLEASE YOUR HONORS, to grant unto the plaintiff a writ of subpoena, to be directed to the said Elwood Hamilton, Collector of Internal Revenue for the Fifth Collection District of Kentucky, the defendant hereinbefore named, commanding and requiring him to appear herein and answer, but not under oath, answer under oath being hereby expressly waived, the several allegations in this bill contained.

LEVY MAYER,
WILLIAM MARSHALL BULLITT,
Counsel for plaintiff.

STATE OF KENTUCKY, }
COUNTY OF JEFFERSON, } *ss.*:

Daniel K. Weiskopf, being first duly sworn, on oath deposes and says, that he is the president of the Kentucky Distilleries & Warehouse Company, the plaintiff herein, that he is authorized to verify the foregoing bill; that he has read the said petition and knows the contents thereof and that the same are true, except as to the statements in said petition stated to be made on information and belief, and as to those, he believes them to be true.

DANIEL K. WEISKOPF.

Subscribed and sworn to before me this 10th day of October, 1919.

M. L. WEIST,
Notary Public in and for Jefferson County, Kentucky.

At a Court held October 10, 1919:

This day came the plaintiff, Kentucky Distilleries & Warehouse Company, by Levy Mayer and Wm. Marshall Bullitt, Attorneys, and notice of a motion for the issuance of a preliminary writ of injunction having been served, filed and noticed of this date, moved herein for a preliminary injunction to the prayer of the petition in equity herein, and the Court being advised, it is ordered,

1. That the said motion for a preliminary injunction be filed.

2. That the hearing of said motion be and the same hereby is set for October 27, 1919, at 10 o'clock A. M.

3. That the defendant has leave to file answering affidavits, copies of which shall, on or before October 22, 1919, be served upon Wm. Marshall Bullitt, one of plaintiff's counsel, by leaving copies thereof with some one at his office, 1200 Lincoln Bank Building, Louisville, Ky.

4. The plaintiff shall have until October 27, 1919, to serve rebuttal affidavits by delivering copies thereof to W. V. Gregory, Esquire, United States District Attorney.

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Decree.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

At a Court held on October 27, 1919:

This cause coming on to be heard upon the plaintiff's motion for a temporary injunction, the defendant thereupon moved to dismiss the Bill for want of equity on its face, the cause having been argued, and the Court being advised, it is ordered that the motion to dismiss be and the same hereby is overruled.

Thereupon, the defendant declined to plead further, and the plaintiff moved for a permanent injunction in accordance with the prayer of the Petition in Equity, and the cause having been argued and submitted upon final hearing upon the Petition in Equity, and the Court being advised,

IT IS ORDERED AND ADJUDGED AND DECREED as follows, to-wit:

That the defendant, Elwood Hamilton, Collector of Internal Revenue for the Collection District of Kentucky, be and hereby he is enjoined from refusing,

(*a*) To receive the application of the Kentucky Distilleries and Warehouse Company

for the withdrawal of 534 barrels of whiskey from United States Bonded Distillery Warehouses #368 and #34 in Louisville, Kentucky, and,

(*b*) To accept from the Kentucky Distilleries and Warehouse Company the lawful tax money due by the Kentucky Distilleries and Warehouse Company upon the withdrawal from bond of said 534 barrels of whisky, and,

(*c*) To release said 534 barrels of whiskey to the Kentucky Distilleries and Warehouse Company upon payment by it of said lawful tax.

The defendant presented its petition and assignment of errors, praying for an appeal from the foregoing decree to the Supreme Court of the United States, which appeal is granted, and it is ordered that same operate as a supersedeas.

WALTER EVANS,
District Judge.

The motion to dismiss, the petition for appeal and the assignments of errors referred to are as follows, to-wit:

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - - *Plaintiff,*

vs. **Motion to Dismiss.**

ELWOOD HAMILTON, ETC., - - *Defendant.*

The defendant, Elwood Hamilton, Collector, moves to dismiss the bill for want of equity on its face.

W. V. GREGORY,
United States District Attorney.

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Petition for Appeal.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

To the Honorable Judge of the District Court for the Western District of Kentucky.

The defendant, Elwood Hamilton, Collector of Internal Revenue, respectfully represents to the Court that he is aggrieved by the decree entered in this case on the 27th day of October, 1919, for the reasons set forth in the assignment of errors hereto attached.

WHEREFORE, he prays for an appeal to the Supreme Court of the United States, to the

end that said decree may be reviewed and, if found erroneous, reversed.

Respectfully,

W. V. GREGORY,

United States Attorney.

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Assignment of Errors.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

The defendant, Elwood Hamilton, Collector, says that in the record and proceedings had in the above entitled cause, there is manifest error in the following particulars, towit:

1. The Court erred in overruling defendant's motion to dismiss, because his refusal to accept the taxes tendered, and to permit the removal of the whisky in question, was in obedience to the Act of Congress of November 21, 1918, which is a valid and constitutional Act, and is still effective.

2. The Court erred in granting the injunction prayed for, for the same reason that he erred in overruling the motion to dismiss.

W. V. GREGORY,

United States Attorney.

On October 27, 1919, the following stipulation was filed by the parties:

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Stipulation.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

It is stipulated between plaintiff and defendant that on any appeal to the Supreme Court of the United States from the final decree herein, the record shall consist of the following papers as constituting the entire record in the case, and the Clerk is authorized so to certify:

Petition in Equity.
Order October 10, 1919.
Motion to Dismiss Petition in Equity, filed October 27, 1919.
Final decree entered October 27, 1919.
Petition for appeal.
Assignment of errors.
This stipulation.

That the issuance and service of a citation are waived.

LEVY MAYER,
WM. MARSHALL BULLITT,
Attorneys for Plaintiff.
W. V. GREGORY, *United States Attorney,*
Attorney for Defendant.

DISTRICT OF KENTUCKY, *ss.*

I, A. G. RONALD, Clerk of the District Court of the United States for the Western District of Kentucky at Louisville, do hereby certify that the foregoing 30 pages contain a true and correct transcript of all the portions of the record to be copied in the case mentioned in the caption hereof, in accordance with the stipulation of counsel on file and copied therein, as the same appears from the record and files in my said office.

WITNESS, my hand and seal of said Court this the 29th day of October, A. D. 1919.

A. G. RONALD, *Clerk,*

By————————, *D. C.*

and for other purposes," which Act is known as the "War Prohibition Act," the same being claimed to be unconstitutional under the Fifth Amendment to the Constitution of the United States and also as in conflict with the Eighteenth Amendment to the Constitution of the United States prohibiting the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes, said appellee insisting that under said amendment, the adoption of which by three-fourths of the States was proclaimed on January 29, 1919, by the Acting Secretary of State of the United States, the period of one year was allowed from said date during which said manufacture, sale, transportation, importation and exportation was permitted; that said War Prohibition Act further is asserted not to be now of force because it is claimed that same has expired according to its terms; that the bill of complaint is brought against appellant to restrain and enjoin him from refusing to permit appellee to withdraw the distilled spirits owned by it from bond for beverage purposes and from refusing to accept from said appellee the taxes due to the United States thereon.

Movant further shows that in said case a final decree was rendered on October 27, 1919, enjoining appellant as prayed, but that a petition for appeal to this Court, with assignments of error, being presented, the said appeal was allowed and said decree

meanwhile superseded; that by reason of the fact that said Eighteenth Amendment to the Constitution of the United States becomes of full effect after one year from its ratification, it is of great importance

[redacted]

which have been advanced for argument on December 8, 1919, and it is respectfully suggested that this case might conveniently be set for hearing at the same time as said two last-mentioned cases.

Counsel for appellee join in the request for the advancement of this case

ALEX. C. KING,
Solicitor General.

NOVEMBER, 1919.

○

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 589

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, Appellant,

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

APPELLEE'S SUGGESTIONS SUPPORTING THE GOVERNMENT'S MOTION TO ADVANCE.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Appellee.

WESTERFIELD-BOOTH CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

ELWOOD HAMILTON, COLLECTOR, ETC., - - *Appellant,*

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, - - - - - - - - *Appellee.*

Appeal from the District Court of the United States for the Western District of Kentucky.

APPELLEE'S SUGGESTIONS SUPPORTING THE GOVERNMENT'S MOTION TO ADVANCE.

The United States moved to-day (November 10th) to advance this case for an early hearing.

The appellee earnestly suggests that the case be assigned for hearing *during this current month* of November, 1919, because unless the case is promptly heard and decided, the mere lapse of a few weeks' time will, on account of the Eighteenth Amendment becoming effective, deprive the appellee of the benefit of the decision below and render valueless property worth many millions of dollars, to which, under the decision below, appellee and those interested with it, are constitutionally entitled.

Counsel fully recognize the unusual character of the request, but the extraordinary circumstances seem to justify it.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Appellee.

November 10, 1919.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE for the collection district of Kentucky, appellant,
v.
KENTUCKY DISTILLERIES & WAREHOUSE Company, appellee.

No. 589.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

This is a suit in equity by a distiller to enjoin a collector of internal revenue from refusing to accept tax on a quantity of whisky and to permit its removal from bond for beverage purposes. A motion to dismiss having been overruled, a final decree was rendered granting the injunction, to reverse which the collector prosecutes this writ of error.

THE STATUTE.

The action of the collector of which complaint is made was based on the act of November 21, 1918, 40 Stat., c. 212, pages 1045, 1046, which provides:

> That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the pres-

ent war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export.

THE FACTS.

The appellee, being the owner of a large quantity of whisky in bonded warehouses, tendered to the appellant the taxes which would be due and payable upon the removal from bond of the whisky which it asked leave to remove from bond to be sold for beverage purposes in the United States. Appellant refused to receive the taxes or permit the removal upon the ground that the removal from bond of whisky for beverage purposes, except for export, was prohibited so long as the statute above quoted should be in effect.

QUESTION INVOLVED.

The sole question involved is the constitutionality of the act when it was passed and of its enforcement when the bill was filed October 10, 1919. The appellee asserts that:

1. The prohibition in question is illegal, void, and unconstitutional, in that it operates to take private property for public use without just compensation

in contravention of the Fifth Amendment to the Constitution.

2. The act has terminated and ceased to be of legal effect.

ASSIGNMENTS OF ERROR.

The assignments of error which are found at page 29 of the record challenge the correctness of the above contentions.

BRIEF.

I.

The statute was enacted not under the general police power but under the war powers of Congress, and its validity depends upon whether it is an appropriate means of carrying into effect the war powers of the Federal Government. The Constitution, Article I, section 8; *United States* v. *Doremus*, 249 U. S. 86.

II.

Congress is empowered to enact any law which has a substantial relation to the successful conduct of the war and which is not forbidden by any express provision of the Constitution. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 149; *Gibbons* v. *Ogden*, 9 Wheat. 195; Willoughby on the Constitution, Vol. 2, section 715, p. 1212; *Legal Tender cases* 12 Wall. 563; *Stewart* v. *Kahn*, 11 Wall. 493, 506, 507; *Adair* v. *United States*, 208 U. S. 161, 179–180; *Employers' Liability cases*, 207 U. S. 463; *Trademark Cases*, 100 U. S. 82.

III.

The regulation or prohibition of the sale and manufacture of intoxicants has a substantial and reasonable relation to the end to be accomplished by exerting the power to declare war. *McCulloch* v. *Maryland*, 4 Wheat. 422; *Lottery case*, 188 U. S. 321, 355; *Stewart* v. *Kahn*, 11 Wall. 493, 506–507; 40 Stat., c. 15, sec. 12, p. 82; 40 Stat., c. 53, sec. 15, p. 282.

IV.

The motives of Congress or of individual Members of Congress can not be inquired into by the courts. *United States* v. *Des Moines &c. Co.*, 142 U. S. 510, 544; *Amy* v. *Watertown*, 130 U. S. 301, 319; *Weber* v. *Freed*, 239 U. S. 325, 330.

V.

The validity of the act is not affected by the fact that it partakes of the nature of a police regulation. *Hoke* v. *United States*, 227 U. S. 308, 323; *Wilson* v. *United States*, 232 U. S. 563, 567; *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 515; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley's Constitutional Limitations, 732; *Gibbons* v. *Ogden*, 9 Wheat. 1, 202.

VI.

The statute does not constitute a taking of property and does not contravene the Fifth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623, 668–669; *Kidd* v. *Pearson*, 128 U. S. 1.

VII.

The statute does not violate the Tenth Amendment.

VIII.

The question is in no way affected by the Eighteenth Amendment.

IX.

A state of war still exists and the statute is in effect whether demobilization is complete or not. *United States* v. *Anderson*, 9 Wall. 56, 70; *Hijo* v. *United States*, 194 U. S. 315, 323; *The Protector*, 12 Wall. 700.

X.

The validity of the statute is not affected by disagreement between the President and Congress as to the necessity for its being continued in force.

XI.

The power of Congress to determine conclusively the necessity for the exercise of its war powers, at any time, during the existence of a state of war, is absolutely essential.

ARGUMENT.

It is not claimed that this statute was enacted under the general police power. It is conceded, of course, that, until the Eighteenth Amendment becomes effective, Congress has no general police power to regulate the manufacture and sale of intoxicating liquors within the States. Its power in this regard is limited to the making of such laws as are neces-

sary and proper for carrying into effect the express powers conferred by the Constitution upon the Federal Government.

STATUTE ENACTED UNDER THE WAR POWERS OF CONGRESS.

The authority for the passage of the act of November 21, 1918, is found in Article I, section 8, of the Constitution, which includes in the enumeration of powers conferred upon Congress the power "to declare War, * * * to raise and support Armies * * * to make Rules for the Government and Regulation of the land and naval Forces," and, in the concluding provision of the same section, "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The provision last quoted is attached to every express power which is conferred upon Congress. Its effect is to authorize the enactment of all laws which are appropriate to the carrying into effect of the express powers of Congress and which are not in conflict with any other provision of the Constitution. For example, as an incident to the power of taxation, Congress has for years regulated and exercised a supervision over the manufacture of intoxicating liquors, and, in recent years, has, as an incident to the same power, imposed elaborate regulations and restrictions upon the sale of narcotic drugs.

United States v. *Doremus*, 249 U. S. 86. The question here, then, is not whether Congress has been given expressly the power to prohibit the sale or manufacture of intoxicants, but whether such a prohibition is an appropriate means for carrying into effect the war powers of the Federal Government.

NATURE AND EXTENT OF THE WAR POWERS OF CONGRESS.

This court has quite recently said:

> The complete and undivided character of the war power of the United States is not disputable. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S., 135, 149.

This is merely a restatement, in different language, of what this court long ago, in speaking of the power of Congress to regulate interstate commerce, said:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 195.

The power conferred upon Congress is to declare war and to enact such legislation as may be necessary and proper to conduct the war to a successful issue and restore the country to peace conditions.

> The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. * * * The power to wage war carries with it the authority not only to

> bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal. (Willoughby on the Constitution, vol. 2, sec. 715, p. 1212.)

A war threatens the very life and existence of the Nation. While it exists its successful conduct is the matter of supreme importance, to which every other consideration must yield. The Constitution has not left the Federal Government without any necessary power to preserve its life and existence. In *Legal Tender cases*, 12 Wall. 563, the court said:

> It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the *sword* and the *purse*, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, power of absolute control over the resources of the country.

To meet the necessities of war, therefore, the entire resources of the country and the bodies, lives, wealth, and property of the citizens are subject to the absolute control of the Government. This was recognized by Congress in the resolution which pledged every resource to the war service of the country. In other words, they are by the Constitution pledged to the defense of the Nation. And, in

speaking of the subject with special reference to the Civil War, it was said that—

> the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. (*Stewart* v. *Kahn*, 11 Wall. 493, 507.)

It may be safely stated, therefore, that Congress has ample power to enact any laws appropriate to the successful conduct of the war which are not forbidden by any provision of the Constitution. It may be conceded that, like all other powers of Congress, the war powers are subject to the limitation that legislation under them must have some real relation to the purposes of the war. *Adair* v. *United States*, 208 U. S. 161, 179–180; *Employers' Liability Cases*, 207 U. S. 463; *Trade-Mark Cases*, 100 U. S. 82. And the rule may be accurately stated to be that Congress is empowered to enact any law which has a substantial relation to the successful conduct of the war and which is not forbidden by any express provision of the Constitution.

THE REGULATION OR PROHIBITION OF THE SALE AND MANUFACTURE OF INTOXICATING LIQUORS HAS A SUBSTANTIAL AND REASONABLE RELATION TO THE END TO BE ACCOMPLISHED BY EXERTING THE POWER TO DECLARE WAR.

In determining the validity of a statute passed when the country is in a state of war and under the war powers of Congress, the courts are at liberty to inquire into but two questions: (1) Has the act a

substantial relation to the successful conduct of the war, and (2) is it prohibited by any express provision of the Constitution.

The inquiry into the relation between a statute and the purposes of the war does not involve an inquiry into the wisdom of or the necessity for a particular statute. When it is ascertained that the statute can reasonably be said to have any effect upon the war the required relation exists. Individual judges may be of opinion that the measure is unwise, or even that its effect will be detrimental to the war interests of the country. But if it is calculated to affect in any way the result of the war, the question as to whether it is a proper or the best means to be employed is one committed solely to the judgment and discretion of Congress. In *McCulloch* v. *Maryland*, 4 Wheat. 422, it was said:

> But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.

And in the *Lottery case*, 188 U. S. 321, 355, it was said:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

And in *Stewart* v. *Kahn*, 11 Wall. 493, 506, in speaking of the war powers of Congress, the court said:

> The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

Almost immediately upon the declaration of war in 1917, Congress took the view that the manufacture and distribution of intoxicating liquors would have an effect on the conduct of the war from two standpoints. The beverage use of intoxicants by those engaged in the military or naval service was regarded as detrimental to their efficiency, and the use of men and food products in the manufacture of intoxicants was deemed an unnecessary drain upon the resources of the country. Accordingly, as early as May 18, 1917, an act was passed forbidding the sale of intoxicants to soldiers or sailors or within certain zones established about military camps. (40 Stat., c. 15, sec. 12, p. 82.) And in August, 1917, the food-control act, prohibiting the use of food products in the manufacture of distilled liquors was passed. (40 Stat., c. 53, sec. 15, p. 282.) The power of Congress to pass both of these acts would doubtless not be questioned for a moment by anyone. The food-control act also conferred upon the President the power to regulate or prohibit the use of food products in the manufacture of malt or vinous liquors whenever, in his opinion, such regu-

lation or prohibition should be necessary. The President at various times exercised this power and the validity of his action would scarcely be questioned.

In November, 1918, the act now in question was passed. From the passage of the food control act in August, 1917, the manufacture of distilled spirits had been unlawful, but the Federal Government had not interfered with the sale of such spirits previously manufactured except to the extent that these sales were prohibited by the act of May 18, 1917. An armistice had been signed and actual hostilities had ceased pending negotiations for peace. There was an Army in Europe and this country of about 4,000,000 men under arms. The terms of the armistice were such that the President had expressed to Congress the opinion that Germany would never be able to resume hostilities. Until peace should be an accomplished fact, however, the country was still at war, and no man could know certainly what would happen or what the war necessities would be. It might become necessary to occupy Germany to compel a satisfactory treaty. In this situation, Congress, with the approval of the President, determined that the time had not arrived when it would be safe to abandon all the measures which had been adopted for the defense of the Nation. The duty rested upon Congress to keep the country and its armies in condition to act promptly and effectively in any emergency that might arise so long as a state of war continued. Apparently, it was anticipated that it would not be necessary to keep the entire Army in the field,

but that demobilization would be commenced and gradually proceeded with. But Congress was of opinion that the restriction upon the use of food products in the manufacture of intoxicants should not be removed and that the use of intoxicants by soldiers in the service or by those from whom soldiers would be drawn in case of a renewal of hostilities or must be depended upon to carry on the necessary industries of the country in the event of such a resumption of hostilities should be prohibited. Accordingly, the act now in question was passed and approved by the President.

In thus adopting, as war legislation, measures dealing with the liquor traffic Congress necessarily decided that that traffic would have an effect detrimental to the war interests of the country. It is not to be supposed that every individual would agree that the decision was a wise one; not all Members of Congress were in accord. There are undoubtedly those who believe that it was an unwise measure. There are those who even believe that a moderate distribution of liquors among the soldiers themselves tends to increase the fighting efficiency of the Army. There are those who believe that the suppression of the manufacture and sale of liquor has a depressing effect upon the financial condition of the country, and hence impairs its ability to meet the necessities of the war. On the other hand, there are those who believe that the use of liquor by soldiers is highly detrimental to the morale of the Army, and that the withdrawal of men and food products from the manufacture of liquor

greatly increases the ability of the country to do those things necessary for the successful conduct of the war. It is obvious, however, that both opinions imply that the prohibition of the manufacture and sale of intoxicants will have an effect upon the war either for good or evil. This establishes a substantial relation between the statute in question and a proper exercise of the war powers of Congress. Whether the effect will be for good or evil must be decided by somebody, and, as shown by the authorities above quoted, the power to make this decision has been vested in Congress and not in the courts. The measure was passed when the country was in a state of war. It was avowedly passed under the war powers of Congress and to promote the success of the war. The question, therefore, of whether it was necessary or whether it was the best means that could be employed is not a justiciable question and is conclusively settled by the act of Congress.

THE MOTIVE OF CONGRESS OR OF INDIVIDUAL MEMBERS OF CONGRESS CAN NOT BE INQUIRED INTO.

It has been charged that the purpose of the act, as stated on its face, was a mere pretense resorted to by Congress to usurp the power to make local police regulations. The mere statement of the proposition makes obvious its startling and revolutionary character. This court, with its very proper respect for the rights and dignity of the coordinate branch of the Government, has never, in its history, assumed such a power. It has never, in all the cases decided by it, assumed to say that an act of Congress reciting its

purpose was void because the court found it was enacted from improper motives or for the purpose of usurping power over local affairs.

Nothing is better settled than that if an act of Congress deals with a subject over which that body has power it is not for the courts, in determining its validity, to inquire into the motives which led to its passage. Its validity depends upon what it is and not upon whether its enactment was prompted by proper or improper motives. *United States* v. *Des Moines, &c. Co.*, 142 U. S., 510, 544; *Amy* v. *Watertown, No. 1*, 130 U. S., 301, 319; *Weber* v. *Freed*, 239 U. S., 325, 329–330.

THE VALIDITY OF THE ACT IS IN NO WAY AFFECTED BY THE FACT THAT IT PARTAKES OF THE NATURE OF A POLICE REGULATION.

It is true that Congress had no power to enact a prohibition law merely as a police regulation. It is also true that the general police powers of government are vested in the States; but it is not true that the Federal Government is entirely without police powers. It may exercise such powers to the extent necessary to make effective the powers expressly granted. Thus in *Hoke* v. *United States*, 227 U. S., 308, 323, speaking of the power of Congress over interstate transportation, it was said that—

> the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.

And in *Wilson* v. *United States*, 232 U. S., 563, 567, speaking of the white-slave law, which was held constitutional, the court said:

> As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce.

In *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 515, it was said:

> Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations.

And an even more direct statement to this effect is:

> Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution; * * * *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 215, citing Cooley's Constitutional Limitations, 732.

In other words, when necessary for the proper exertion of its express powers, Congress may use exactly the same means which the State may use for the exertion of its own powers. This is no new doctrine. In *Gibbons* v. *Ogden*, 9 Wheat. 1, 202, it was said:

> It is obvious, that the Government of the Union, in the exercise of its expresspowers, that, for example, of regulating commerce

> with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State.

The right of the State to enact prohibition rests upon its power to pass laws for the protection of the public health, morals, and safety. The power of Congress in time of war is to enact such legislation as is necessary to protect the safety of the Nation or the efficient exercise of the war powers. A State may prohibit the sale of liquor because its legislature determines that such sale is detrimental to the public health, morals, or safety. In time of war, when the safety of the Nation is the question of supreme importance, Congress may use the same means and prohibit the sale of liquor if, in its judgment, such sale is detrimental to the safety of the Nation, or promotes its efficiency in war.

ACT NOT IN CONFLICT WITH THE FIFTH AMENDMENT TO THE CONSTITUTION.

As we have seen, if the prohibition of the liquor traffic has any substantial relation to the successful conduct of the war, and this can scarcely be denied, the only remaining question is whether the passage of the statute in question is forbidden by any provision of the Constitution. The claim is that appellee's property is taken for public use without compensation and, therefore, the Fifth Amendment to the Constitution is violated. It is not claimed that the Government has appropriated the whisky in ques-

tion, or has devoted it, or required it to be devoted, to any public use. On the contrary, the claim simply is that, by denying appellee the right to sell it during the period prescribed, the law has destroyed property rights. So far as the Government has had occasion to use distilled spirits, they have been treated just like any other property taken for public use. The Food Control Act, which prohibited the further manufacture of distilled spirits, gave to the President the right to take over for the Government any distilled spirits that might be needed for war or governmental purposes, and provided that compensation therefor should be made. The spirits now in question are those which the Government has had no occasion to use and hence has not taken over. That an act of a State legislature forbidding the sale of intoxicating liquors upon the ground that they are injurious to the health, morals, or safety of the community is not a taking of property for public use is thoroughly settled by the cases of *Mugler* v. *Kansas*, 123 U. S. 623, 668–669, and *Kidd* v. *Pearson*, 128 U. S. 1. In the former case, dealing with a State prohibition statute, it was said at pages 668–669:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community can not, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

And again:

> The power which the States have of prohibiting such use by individuals of their prop-

> erty as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case a nuisance only is abated; in the other unoffending property is taken away from an innocent owner (p. 669).

It is true that it was the Fourteenth Amendment which was invoked in that case, but there can now be no doubt that the restriction imposed by the Fifth Amendment upon the Federal Government is identical in effect with that imposed by the Fourteenth Amendment upon the States. In adopting such measures as it deems necessary for the proper maintenance and support of the Army and the conduct of the war, Congress exercises the same kind of power which the States exercise by passing legislation to prevent the use of property for purposes deemed injurious to the health, morals, or safety of the community. Surely, the power to prevent the use of property which it is believed by Congress will

impair the ability of the Nation to successfully conduct the war can be no less extensive than the power of a State to enact similar legislation for the protection of the health, morals, or safety of the community. When the life of the Nation is at stake the power of the Government to restrict the use of property surely can be no less than the power of a State in ordinary times to protect the health or morals of its citizens. The nature of the power is identical in both cases. It is not a taking of property in any sense.

In both cases the citizen is denied the right to make a noxious use of his property. This obligation inheres in the ownership of all property. There is no inherent right to use property in a way that will be detrimental to the public. The use of property under certain circumstances and conditions may be entirely harmless and under other circumstances and conditions vitally injurious to the public. In times of peace there is no right to use it so as to injure the morals or the health of the community, and a State may prohibit such use without making compensation. So in time of war there is no right to use it in a way which will impair or interfere with the efforts of the Government to successfuly conduct the war, and Congress has the same power to prohibit such use. When, therefore, a citizen has been denied the right to use his property in a way that will injure the public, in view of existing circumstances, he has simply been required to do what is required by one of the basic principles of our laws of property. It can not

be said, therefore, that an act of this kind takes his property without compensation or without due process of law.

NO VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION.

It has sometimes been said that this statute violates the Tenth Amendment by exercising powers which that amendment reserved to the States. What has already been said is a sufficient answer to that contention. The power exerted was expressly delegated to Congress in the power to pass all such laws as should be necessary and proper to make effective the declaration of war. If it be, therefore, a power delegated to Congress, its exercise was no encroachment upon the reserved rights of the States.

QUESTION NOT AFFECTED BY THE EIGHTEENTH AMENDMENT.

A contention somewhat difficult to understand has been made that this act is void because in conflict with the Eighteenth Amendment, which makes the sale and manufacture of intoxicating liquor unlawful after the lapse of one year from its ratification. It was ratified in January, 1919, and hence it does not affect the sale or manufacture of liquor until January, 1920.

To sustain the contention, it is necessary to make this amendment read as though it said: "The sale or manufacture of intoxicating liquors shall be lawful until one year after the ratification and thereafter unlawful." The language used will bear no such

construction. It simply leaves the liquor traffic where it was until January, 1920. At the time it was ratified by the requisite number of States, the sale and manufacture of intoxicants were prohibited by law in a majority of the States. It had been previously prohibited during the period of the war and demobilization by act of Congress. The amendment does not purport to confer upon those engaged in the business any rights which they did not already have. On the contrary, its whole purport was to take away from them, upon a certain date, the rights they were then exercising.

This amendment was submitted by Congress to the States in December, 1917, four months after the manufacture of distilled spirits during the period of the war had been prohibited. The purpose of the amendment had no relation to the war powers of Congress. The object, on the contrary, was to enlarge the powers of the Federal Government in ordinary times. The States, therefore, acted upon it with full knowledge that Congress had the power during the war to exercise complete control over the liquor traffic, and was already exercising that power to the extent of prohibiting the manufacture and limiting the sale.

At the time the act of November 21, 1918, was passed only thirteen States had ratified the Eighteenth Amendment. The remaining thirty-one States which subsequently ratified it did so with full knowledge that Congress had already prohibited both the manufacture and the sale of distilled spirits

during the war. If they had desired that there should be a year after the war prohibition ceased to be effective in which the sale of liquor would not be unlawful, they had only to delay ratification. They however, ratified. The result is that until January, 1920, the manufacture and sale of intoxicating liquors remain subject to such powers of Congress and the several States as existed prior to the ratification of the amendment. The insistence is that after the ratification of the amendment not only was Congress powerless to pass a prohibition act under the war powers, but that the act which it had already passed was nullified. This would give to the amendment before its effective date a most sweeping effect. That amendment, like all other parts of the Constitution of the United States, is the supreme law of the land. If it makes a previous act of Congress on this subject void, it must have the same effect upon laws of the various States. The logic of the argument, therefore, is that the adoption of this amendment nullifies every State or Federal law which prohibits the manufacture, sale, or transportation of liquor, and that such manufacture, sale, or transportation is until January, 1920, lawful, notwithstanding any previously enacted State or Federal law. The fallacy in the argument is that the amendment confers no rights whatever upon those engaged in the liquor traffic, but merely provides that, after a certain date in the future, the rights which they now have will no longer exist.

STATUTE HAS NOT CEASED TO BE EFFECTIVE.

The contention will be made that the act is no longer effective because the emergency which caused Congress to pass it no longer exists. The time within which it should be effective was fixed on its face. It was to be a law—

> until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States.

It was passed after the signing of an armistice which is still in effect. Nothing has since occurred except that the Army has been largely and perhaps completely demobilized, and various steps have been taken toward restoring the country to a peace basis in anticipation of a treaty of peace expected to follow the armistice. The possibility of a resumption of hostilities is as great now as it was last November. It is difficult, therefore, to see how it can be said that the act is no longer effective unless it can be said that Congress had no power to pass it on November 21, 1918. When the act was passed, it was obviously assumed that the war would terminate by a treaty of peace before our 4,000,000 soldiers could be demobilized, and therefore it was intended that the statute should remain in effect for a period following the treaty of peace during which the Army would be in process of demobilization.

Contrary to this anticipation, however, it may be that demobilization has been or will be completed

before the war terminates by a treaty of peace being put into effect. At any rate, the question of the power of Congress to keep in effect such legislation after a treaty of peace does not now arise, and in all probability never will. According to the terms of the act two things—the termination of the war and demobilization—were required to occur before it should become inoperative. If, therefore, we have not reached the termination of the war, the act is still in effect. There ought not to be at this late date any difficulty in determining what can legally put an end to the war. Ordinarily, a war between belligerent countries is terminated by a treaty of peace. There have been wars, of course, at the conclusion of which there was no treaty. One Government may be completely overthrown and one belligerent brought under the dominion of the other, so that there is no occasion for a treaty. But, so far as legal rights depend upon the termination of a war, the date of termination must be fixed by some act of the political department of the Government. Thus, in speaking of the Civil War, this court held in the case of *The Protector*, 12 Wall. 700, that:

> The beginning and termination of the late rebellion, in reference to acts of limitation, is to be determined by some public act of the political department. Its termination as to certain States will be referred to the proclamation of April 2, 1866, declaring the war had closed in those States; as to Texas, the proclamation of the 20th of August, 1866, declaring it had closed in that State also.

In the present case, hostilities have been suspended as the result of a written armistice in which, of course, the existence of a state of war was recognized and the belligerents engaged to endeavor to negotiate a treaty of peace. In such a case it is in contemplation of the parties that only a treaty of peace will terminate the war or a state of war. It is well settled that until a treaty of peace has been made effective a foreign war can not be said to have ended. *United States* v. *Anderson*, 9 Wall. 56, 70; *Hijo* v. *United States*, 194 U. S. 315, 323.

There were many cases following the Civil War, and some following the Spanish War, in which the rights of the Government or the rights of litigants depended upon the date at which the war ended. This expression is used in a colloquial and also in a legal sense. Thus, in a general way, history records, and any intelligent person would say in answer to an ordinary question, that the Civil War ended in the spring of 1865 when the last of the Confederate Armies surrendered. In a colloquial sense this is true. But wherever a right depended upon the date of the termination of that war it was held that it did not in any legal sense end with the surrender of the armies. On the contrary, it was held that this surrender did not constitute an end of the war, but that, as the date of the beginning of the war must be some official act, so it could only be terminated in the same way. Hence, it was always held that legally the war did not end until the proclamation of the President to that effect, and hence the date

of the legal termination of the Civil War is August, 1866, and not May, 1865.

This was the ruling in the case of a war that did not and could not terminate in a treaty of peace, for the reason that one of the belligerent Governments was entirely overthrown and the portion of the country which had been under the control of that Government came back under the control of the Government of the United States. There was, therefore, no occasion for a treaty and no Government to make it. The ability to renew hostilities was more completely destroyed than was the ability of the German Government to renew hostilities destroyed by the armistice of last November, and yet it was held that, for all purposes which came before the courts, the Civil War did not end until August, 1866. *United States* v. *Anderson*, 9 Wall. 56, 70. If this was true in a case where one of the belligerents had unconditionally surrendered and was absolutely in the power of the other, much more must it be true where, as in this case, instead of a surrender, the belligerents have entered into a solemn writing which expressly recognizes the existence of a state of war and constitutes merely an agreement to suspend hostilities until an effort can be made to end the war by a treaty of peace.

Exactly the same conditions that now exist existed during the period beginning with the signing of a protocol by Spain and the United States, on August 12, 1898, and the ratification of a treaty of peace, in April, 1899. And this court said that a state of

war did not, in law, cease until the ratification in April, 1899, of the treaty of peace. *Hijo* v. *United States*, 194 U. S. 315, 323.

Indeed, it will scarcely be denied that legally the country will be in a state of war until a treaty of peace is put into effect. This, it seems, must be conclusive of the case unless it can be said that the courts may assume to determine whether during the period of an armistice there is any emergency which justifies the exertion of the war powers of Congress. The fallacy in the argument is in assuming that the validity of legislation enacted under the war power depends upon whether the courts agree with Congress that actual conditions during a period of war, or while the country is in a state of war, require the exertion of such power. To apply such a rule would throw the conduct of a war into hopeless confusion. It would make subject to the control of the courts every war measure passed by Congress and would make the validity of those measures depend upon the opinion of the courts rather than of Congress as to what measures conditions arising in the course of war may make necessary or proper. Plainly, it was never intended that the ability of the Nation to defend itself and to prosecute wars should be hampered and impaired by such divided authority.

It is true that an emergency is necessary to justify the exertion by Congress of its war powers. It is a mistake to say, however, that the *power* of Congress is dependent, when war is once declared, upon contingencies that arise during the progress of the war.

These contingencies, of course, control Congress in determining matters of policy and in shaping legislation for the conduct of the war. But the emergency which brings into existence the right to use these war powers is the declaration of war. When, therefore, the validity of a measure purporting to be a war measure is called in question, the courts must determine whether a state of war exists. When, however, it appears that Congress has declared war and that war has not been terminated by any official action of the political branch of the Government, the inquiry ends. Congress may do things which to the individual judge may seem foolish and wholly unnecessary. But it is upon Congress that the duty has been imposed of passing measures necessary for the conduct of the war, and therefore these questions must be determined by its judgment, which is not subject to review by the courts. In other words, the existence of a state of war gives the right to use the war powers, and the extent to which they shall be used is solely for the determination of Congress.

VALIDITY OF THE ACT NOT AFFECTED BY DISAGREEMENT BETWEEN CONGRESS AND THE PRESIDENT AS TO THE NECESSITY FOR ITS BEING CONTINUED IN FORCE.

It will be insisted that certain statements made by the President in communications to Congress conclusively establish the fact that no emergency now exists which can justify continuing this prohibition law in effect. The contention seems to be threefold. The first contention is that the mere existence of a

state of war is not sufficient, but that some other actual emergency arising during a state of war must be shown; that the question of the existence of such an emergency is a justiciable question, and that the opinion of the President should be accepted by the courts as conclusive. The second contention seems to be that if the question is not justiciable, but is one which must be determined by the political branch of the Government, the power to determine it rests in the President. The third contention is that the act itself leaves it to the President to determine how long the emergency exists.

The President approved the act of November 21, 1918. It may be, therefore, assumed that he was in entire agreement with Congress that a war emergency then existed which justified the act. Previously, on November 11, 1918, in announcing the terms of the armistice to Congress, he stated in effect that the war was ended because the terms of the armistice were such that it would be impossible for Germany to resume hostilities. This statement can not be used to sustain the present contention. Subsequent to that date Congress enacted and he approved the act in question, and therefore neither can be said to have regarded the war as legally ended or the war emergency as having passed. The argument, however, is based upon two other statements made by the President to Congress. On May 20, 1919, he recommended to Congress not the repeal of the entire act, but the repeal of so much of it as prohibited the

manufacture and sale of wines and beers. His language was:

> The demobilization of the military forces has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers.

This limited recommendation, of course, implies that he did not regard demobilization to have progressed to such an extent that it would be safe to remove the ban upon the manufacture and sale of distilled spirits, which is the only part of the act now in question. He recognized the continued existence of the war powers.

Congress, however, disagreed with the opinion of the President that it would be safe to repeal any part of the statute, and instead of adopting his recommendation passed an act providing for the strict enforcement of the war prohibition. On October 27 the President vetoed this act. He did not place his veto upon the ground that Congress lacked the necessary power, but upon the ground that, as a matter of policy, it was not longer, in his judgment, necessary to continue the prohibition in effect. Referring to the act of November 21, 1918, he said:

> It has to do with the enforcement of an act which was passed by reason of the emergencies of the war, and whose objects have been satisfied in the demobilization of the Army and Navy.

It will be observed that, in neither of these statements, did the President state, or intimate, an opinion that the war was legally ended, or that during a state of war Congress did not have the *right* to exercise its war powers to the extent which was in its judgment necessary. In both communications he was performing his constitutional function with respect to the enactment of legislation. He was in one case recommending legislation which he deemed proper, in the other he was disapproving legislation which he regarded as unnecessary. In both, however, he was not questioning the power of Congress, but was addressing himself to the judgment of a body whose action, in connection with his own, was required for the passage of legislation.

The contention that the necessity during a state of war for the exercise in a particular way of the war powers is a justiciable question is, we think, sufficiently answered by what has been said. The insistence, however, is made that treating that as a question to be decided by the political branch of the Government, the President as a part of the political branch has the right to decide it. There are, of course, matters in which the President, as executive, is vested with the power to act, and in which his judgment and discretion are conclusive. In the actual conduct of the war there are many things with respect to which his power is absolute. But neither the power to declare war nor to pass such laws as are necessary for the conduct of the war is vested in him, except as he is given a part in the

enactment of legislation. He is the Commander in Chief of the Armies of the United States, but the power to raise and support these armies is conferred upon Congress. Without a necessary law passed by Congress he is powerless to draft into the armies a single man, and without an act of Congress he is powerless to raise a single dollar for the support of the Army or the conduct of the war. The question involved here is not where the armies shall be sent, or how they shall be used, but what laws are necessary to support them and to conduct the war to a successfull issue. Upon a declaration of war, Congress, and not the President, decides how large an army shall be raised. In the case of the present war Congress provided for an army by making subject to the call of the President all men between the ages of 21 and 31. There might have been a difference of opinion between the President and Congress as to whether this army was larger or smaller than was necessary, and as to whether the proper method for raising it had been adopted. But if this difference of opinion had arisen and the President's opinion had been overriden by a two-thirds vote of the two Houses, the legislative will of the Nation would have been thus expressed.

The result was the same when the President approved the act of Congress. Thereafter he was powerless to draft into the service any man not within the ages mentioned. Later both Congress and the President concluded that even a larger army would be necessary, and an act was passed making

subject to draft men as young as 18 and as old as 45 years. The men subject to draft under both these acts were so subject because the legislative will to that effect had been constitutionally expressed. On all questions relating to the raising of the Army, and to supporting the Army by keeping the country in condition to make its resources best available, the President's opinion would count for no more than the opinion of any individual, if two-thirds of the Members of both Houses of Congress by legislative act expressed a contrary opinion. The President could not have made the act of November 21, 1918, a law without the concurrence of Congress. Congress could not have made it a law without his concurrence unless passed over his veto. When the law was once passed the President was powerless to repeal it, or continue it in force against the constitutionally expressed will of Congress.

The purpose expressed in the act was both to protect the soldiers themselves against impairment of their efficiency through the use of intoxicating liquors, and to withdraw man power and food products from nonessential employment and devote them to such employment as would tend to keep the country in a safe condition to support the armies and to meet any exigencies that might arise in the course of the war. The possibility of such exigency would, of course, continue until peace was finally established and the country restored to a peace basis. The necessity for such measures would, of course, decrease as the probability of final peace in

the near future should increase. But at what stage of demobilization it would be safe to lift the ban against the sale of intoxicating liquor, or to permit man power and food products to be again used in the manufacture of intoxicating liquor, were questions to be determined by the same judgment and discretion that were involved in the original adoption of such measures.

In May, 1919, the President, evidently attaching more importance to the protection of the soldiers themselves than to the purpose of conserving food and man power, was still apparently of the opinion that conditions had not reached the point when it would be safe to lift the ban from *distilled spirits;* however, he was of opinion, that, under conditions then existing, the manufacture and sale of wine and beer could be safely permitted. This, however, was a question for legislative determination, and he therefore took the only course that was open to him by recommending to Congress the repeal of the law so far as it related to wine and beer. Congress, however, disagreed with him and did not act upon the recommendation. Instead, in October of the present year, it passed an act providing for the more efficient enforcement of the law. The question thus came again before the President in his legislative capacity. He disagreed with Congress and felt that, since demobilization was practically complete, it was not necessary to keep the law longer in force, although the war had not terminated and the country was still in a state of war.

It was merely a difference of opinion as to the extent to which it was still necessary to exert the war power of Congress. Congress was of a different opinion, and by the legislative will, constitutionally expressed, passed the law over his veto. Just as the legislative will was in November, 1918, expressed, with the President's concurrence, to the effect that this particular exercise of the war powers was necessary and proper, so the same legislative will was expressed, over the President's veto, in October, 1919, that the same necessity still existed. When it is remembered that this was a matter with respect to which the President had no constitutional power to act independent of Congress, and with respect to which Congress had the constitutional power to act contrary to the President's will, it is difficult to see how it can be said that the President's view as to the necessity of continuing this law in force is an authoritative determination of that question.

The contention that the act itself leaves it to the President to determine when the emergency ceases to exist is equally difficult to comprehend. Of course, when the act was passed it was entirely uncertain how long the emergency—that is, a state of war—would exist. Congress might very well, if it had seen fit, have provided that the law should be in effect as long as the President considered it necessary. In the Food Control Act, in dealing with beer and wine, it had adopted this policy by empowering the President to regulate or prohibit the manufacture of such beverages to whatever extent he found

necessary, but in the act of November 21, 1918, this policy was not adopted. Congress apparently decided to keep the matter within its own control, as it had a right to do. It therefore, in effect, enacted that the law should remain in force as long as it was competent under the Constitution to exert the war powers of the Government. Of course, if conditions should later arise under which Congress deemed the law no longer necessary its repeal would be an easy matter. But the purpose was clear to leave it in force during the entire period when the war powers could be exerted unless Congress should itself sooner determine to repeal it. The only reference to the President in the act is that he is to determine and proclaim the date of the termination of demobilization. The conclusion of the war had come to have a definite legal meaning through the decisions of this court. Until such a conclusion was reached the law was to be in force, and thereafter it should remain in force until the President should proclaim that demobilization had terminated. Of course, demobilization might have terminated before the conclusion of the war by the putting into effect of a treaty of peace. If so, the period of demobilization would be covered by making the conclusion of the war operate to end the law, but the concern of Congress was for a possible period after the conclusion of the war when the demobilization of the Army would be in progress.

The full purposes of the act, therefore, are met by holding that the law will cease to be in effect whenever two things have occurred, the demobilization of

the Army and the conclusion of the war, and not until then. If the act was susceptible of the construction, however, that the power was conferred upon the President to declare or to proclaim the war concluded at an earlier date than the ratification of a treaty, the appellee's case would not be helped. In that event, in order to put an end to the law, it would be necessary for him to proclaim both the conclusion of the war and the termination of demobilization. He has done neither. It may be assumed from the statement made in his veto message, that he regards demobilization as terminated and that he is ready to proclaim that fact whenever, through the termination of the war, such a proclamation will have any effect. But even if this statement could be taken as a proclamation declaring demobilization terminated, the fact remains that he has not expressly or by intimation declared in any form that the war is concluded. On the contrary, he is exercising every day war powers delegated to him by Congress and has very recently taken the position that a contract between miners and coal operators, which by its terms was to be in effect during the period of the war, was still a binding contract.

It is most respectfully submitted, therefore, that there is no sound reason for saying that anything which the President has said or done can operate to render inoperative the statute in question, or to furnish evidence that will be conclusive, or even admissible, in any court.

THE POWER IN CONGRESS TO DETERMINE CONCLUSIVELY THE NECESSITY FOR THE EXERCISE OF ITS WAR POWERS AT ANY TIME DURING THE EXISTENCE OF A STATE OF WAR IS ABSOLUTELY ESSENTIAL.

To hold that anything more than a declaration of war and the existence of a state of war is necessary in order to bring into play the war powers of Congress would be destructive of the ability of the Government to efficiently and successfully conduct a war. The war powers to be effective must be exerted promptly and without interference. A declaration of war puts at stake the very life of the Nation. There is no fixed rule or standard by which it can unerringly be determined what will be necessary to defend the country and win the war in any case. The judgment of some branch of the Government must control. To make the necessity for every measure which Congress may deem necessary during a period of war subject to review by the courts before it could be executed would be intolerable. Ultimate authority must be vested somewhere. The theory of our Government is that no one of the coordinate branches of the Government is, within its own sphere, any more infallible or less liable to make mistakes than the other. Hence when the Constitution conferred on the lawmaking branch of the Government the power to declare war and, with it, the power to pass such laws as may be necessary and proper in order to successfully conduct the war, it denied to every other branch of the Government the power to question the necessity for the measure so passed.

To say that any other authority may review this judgment of Congress as to the particular measures required by exigencies arising during the war would be to embarrass and render inefficient the exercise of the powers intrusted to Congress. It will scarcely be denied that what has just been said is entirely sound when applied to a period during which the belligerents are engaged in actual hostilities.

But it will be well to consider what it would mean to say that a mere armistice can have the effect of suspending or abrogating any of the war powers of Congress. It is true that we all hope and firmly believe hostilities will not be resumed in the present war, but certainly the power of Congress can not be made to depend upon somebody else's judgment as to the probability or improbability of such a resumption of hostilities. The duty of Congress, during an armistice which may, by any possibility, end with a resumption of hostilities, to be prepared for a continuance of the war is just as imperative as the duty to vigorously prosecute the war during hostilities. If in this case, on account of a strong improbability of an active continuance of the war, Congress is stripped of its war powers, then a precedent is established under which the signing of any armistice would have the same effect. Many may differ widely with Congress as to what is necessary and proper to do in order to meet any exigency of the war that may yet arise. But the responsibility for such action as is taken, or for a failure to take action that may hereafter be found necessary, rests alone upon Con-

gress, and it is respectfully submitted that the Constitution has placed the power to act nowhere else. In short it is the declaration of war and not any particular exigency that may actually arise in the course of the war which brings into play the war powers of Congress.

CONCLUSION.

In conclusion it is respectfully submitted that the act of November 21, 1918, was constitutional when passed, and its enforcement now is likewise constitutional, and the judgment of the District Court should be reversed.

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.
W. V. GREGORY,
United States District Attorney.

NOVEMBER, 1919.

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In the United States Supreme Court.

OCTOBER SESSION, 1919.

NO. 589.

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY,
Appellant,

vs.

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY,
Appellee.

Brief "Amicus Curiæ," for Appellant.

WAYNE B. WHEELER,
R. C. MINTON,
Attorneys, Amici Curiæ.

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BRIEF "AMICUS CURIAE"

ON CONSTITUTIONALITY OF WAR PROHIBITION ACT.

Agreeable to the permission of the court, this brief is filed as "Amicus Curiae," in the hope that some of the suggestions and authorities cited may prove helpful in consideration of the case.

POINTS AND AUTHORITIES.

I.

The War Prohibition Act is constitutional because it has a reasonable relation to the recognized authority of Congress to support the Army and Navy, and to other war powers. It conserves the essentials to an adequate support of the Army and Navy by preventing the waste of food, fuel, transportation facilities, and man-power used in the manufacture and sale of beer, wine, and other intoxicating liquors. (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *U. S.* v. *Doremus*, 249 U. S. 386; *Hoke* v. *State*, 227 U. S. 309.) (Official Report of Hearings on War Prohibition Act, Sixty-fifth Congress, second session, H. R. 11945.)

II.

The War Prohibition Act does not take private property for public use without just compensation. The decisions of the courts are uniform that the Government may prohibit the liquor traffic entirely without providing any compensation to the liquor dealers. (*Mugler* v. *Kansas*, 123 U. S. 623; *Gas Co.* v. *Light Co.*, 115 U. S. 650; *Menken* v. *City of Atlanta*, 78 Ga. 677.)

III.

The 18th amendment gives no guarantee to the liquor traffic to continue during the year from the date of ratification by 36 States. (Section (1), Article 18, of the Constitution; *Stone* v. *Miss.*, 101 U. S. 814; *Kresses* v. *Lyman*, 74 Fed. 763; *Moore* v. *Indianapolis*, 120 Ind. 483; *Clarke Dis. Company* v. *Western Maryland*, 242 U. S. 311.)

IV.

The war has not ended nor has demobilization terminated by the proclamation of the President of the United States. (*The Protector*, 12 Wall, *700 Hijos* v. *U. S.* 194 U. S. 315. *Commercial Cable Co.* v. *Albert Burleson and N. Carlton, Scatena, et al.*, v. *Coffey.*)

V.

PRESUMPTION OF CONSTITUTIONALITY.

United States v. *Harris*, 106 U. S. 635; *A. T. R. Co.* v. *Mathews*, 174 U. S. 96; *Brown* v. *Walker*, 161 U. S. 590.

ARGUMENT.

THE WAR PROHIBITION ACT.

November 21, 1918, Congress adopted as a part of the Food Stimulation Act the following:

> "That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving man-power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, *and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export.*

CONSTITUTIONALITY OF THE WAR PROHIBITION ACT.

The War Prohibition Act of August 10, 1917, prohibited the use of food materials in the production of distilled spirits for beverage purposes. The act of November 21, 1918, prohibited the sale of distilled spirits for beverage purposes. The act of November 21, 1918, pro-

hibited the sale or withdrawal from bond of distilled spirits for beverage purposes and the sale of beer and wine or other intoxicating malt or vinous liquors for beverage purposes after June 30, 1919, and prohibited grains and food products from being used in making beer, wine, and other intoxicating malt and vinous liquors. The act is to continue in effect until the conclusion of the present war and thereafter until the termination of demobilization, the date of which should be determined and proclaimed by the President of the United States.

CONGRESS HAS POWER TO ADOPT A WAR PROHIBITION ACT.

Congress has the power to raise and support the Army and maintain the Navy, provide for the common defense and general welfare, and make all laws necessary to carry into execution all the powers vested in the Constitution. Article 1, Section 8, of the Constitution, among other things provides:

> The Congress shall have power "to declare war."
>
> The Congress shall have power "to raise and support armies."
>
> The Congress shall have power "to provide and maintain a navy."
>
> The Congress shall have power "to provide for the common defense and general welfare of the United States."
>
> "The Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing power."

These provisions of the Constitution authorize the Congress to support an Army and maintain the Navy, and provide for the common defense and general welfare,

to conserve the man-power of the Nation, and increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy.

WHEN CONGRESS IS GIVEN AUTHORITY OVER A SUBJECT-MATTER, IT MAY ENACT LEGISLATION HAVING A REASONABLE RELATION TO THAT END.

The principle herein set forth is sustained in all of the cases both State and Federal. The United States Supreme Court, in the case of *Hoke* v. *State*, 227 U. S. 309, said:

> "Congress may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

In the case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, Justice Hughes, speaking for the Supreme Court, said:

> "It is also well established that when a State, exercising its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective."
>
> *See also Champion* v. *Ames*, 188 U. S. 321.
>
> "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter or spirit of the Constitution are constitutional."

Based on the principles set forth in these and other cases, State and Federal courts have sustained laws prohibiting the sale of any alcoholic beverages, because

such prohibition had a reasonable relation to the end sought by the original prohibition.

> "In the case of *United States* v. *Cohn*, Court of Appeals of Indian Territory, 32 S. W. Rep. 38, the court had before it the duty of interpreting the Federal statute which forbade the sale within the territory of a non-intoxicating liquor known as Rochester tonic. * * * After quoting the statute at length, the court said: 'No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale, and use of intoxicating liquor in all its of forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter. * * * Congress evidently had some purpose in thus changing the ordinary and common use of language.' "

This power has frequently been used by the State and Federal Government to make effective legislation which has been legally acted. The following are a few of the many citations illustrating this principle, and showing the extent to which it has been sustained by the State and Federal courts:

> *Elder* v. *State*, 162 Ala. 41; *States* v. *George* (La.) 67 South 953; *Feibleman* v. *State*, 120 Ala. 122; *Dinkins* v. *State*, 149 Ala.; *Lambee* v. *State*, 151 Ala. 86; *Eaves' Case*, 113 Ga. 794, 39 S. E. 318; *O'Connell's Case*, 99 Me. 61, 58 Atlantic 59; *Pennell* v. *State*, 123 N. W. 115; *State* v. *Maine*, 36, citing; *Com.* v. *Blose*, 116 Mass. 36; *Com.* v. *Brelsford*, 136 Mass. 61; *Com.* v. *Piche*, 98 Maine 348; *Com.* v. *Show*, 133 Mass. 575; *State* v. *O'Connell*, 99 Maine, 61; *State* v. *Intoxicating Liquors*, 76 Iowa, 243; *State* v. *Guinan*,

66 Rhode Island 401; *Crane* v. *Campbell*, 245 U. S. 304; *State* v. *Walder*, 83 O. S. 68; *U. S.* v. *Doremus*, 249 U. S. 86.

DOES THE WAR PROHIBITION ACT HAVE A REASONABLE RELATION TO THE AUTHORITY GRANTED TO CONGRESS TO SUPPORT THE ARMY AND NAVY AND OTHER RECOGNIZED POWERS?

Congress clearly has the power to support the Army and maintain the Navy. What does this include? It clearly includes the obligation to supply them with food, clothing, ammunition, firearms, transportation, shelter, the best possible environment in the training camps, the establishment of policies of Government that will support that Army in field, in factory, on the farm, and with a great national spirit of patriotism that inspires the soldier to be at his best. This is not confined to material Army supplies. General Pershing, the Commander-in-Chief of our Armies in France, said: "From the military point of view, we can not tolerate alcohol among our soldiers. War is merciless; men must be competent. The drinking man makes a bad soldier. No matter how much Germany may believe in feeding up her men on alcohol in order to screw up their fighting courage to the sticking point. The Army won't stand alcohol, because it must conserve its man powe ."

LIQUORS WEAKEN "MAN POWER" IN THE ARMY AND IN CIVIL LIFE.

Public hearings relating on this bill, page 300, set forth the following:

"Alcohol and commercialized vice flourish together and generally die together.

"About 66,000 persons die in the United States directly from drink each year, but several times as many die from diseases of lungs, kidneys, or liver, etc., because these organs are weakened by 'moder ate' drinking. Also hundreds of thousands of ba bi e and children die from hereditary diseases and neglect due to drink.

"There were 600,000 men rejected from the first draft for physical defects. If the ratio had prevailed throughout the country as in Kansas, which has outlawed liquor 37 years, the rejections would have been only 120,000, or one-fifth as many.

"It is one great cause of accidents; in factories, mines, and other industries, truck and auto drives have access to it.

"The world over, more persons died of drink and its effects in 1917 than were men of England and France killed in battle. To appreciate this, look up the data obtained and published by British and American life insurance companies."

LIQUOR WASTES FOOD SUPPLIES.

It was brought to the attention of the committee, on page 299, that brewers used 64,000,000 pounds of sugar; that it was using enough grain to feed 7,000,000 people a year; that while the people were being appealed to by the Government to save food by the crumb, the brewers were wasting it by the ton. All the while the Government was placarding the whole nation with posters entitled "Food Will Win the War. Do Not Waste It!" Congress had clearly in mind the prohibition of food waste by prohibiting the manufacture and sale of beer and wine. This was essential to the best possible support of the Army and Navy.

LIQUOR WASTES FUEL

Needed for ships and transportation. On page 298 the following testimony was presented to the committee:

"The brewers of the country used in 1917 over 3,000,000 tons of coal.

"Anthracite coal mine operators estimate that the decreased production of anthracite alone by reason of alcoholic drinks is 7,500,000 tons per year, or about 11 per cent of the total production.

"If the same conditions prevail with bituminous, the lessened production of bituminous is 56,000,000 tons, the proportion of bituminous coal to anthracite being 7½ to 1.

"The total additional coal available, without employing one more man or investing one more dollar for plant, is over 66,000,000 tons; and your factory or business or home needs coal."

LIQUOR CRIPPLES TRANSPORTATION FACILITIES NEEDED FOR WAR ACTIVITIES.

On page 299 the committee which reported this measure had brought to its attention the following:

Transportation Required by Breweries.

	Tons.
Raw material, 3,000,000,000 pounds foodstuffs, equals	1,500,000
Require, coal	3,000,000
Product 60,000,000	9,000,000
Totals in teams and cars	13,500,000

All of which require hauling and over one-half of which require railroad transportation. This requires over 200,000 freight cars during the year, and uses several

hundred locomotives constantly, and increases freight congestion.

The shortage of labor due to drink is a big factor in the freight tie-up.

It is manifest from the above and other reasons that the prohibition both of the manufacture and sale of liquor has not only a reasonable but a vital relation to a support of the Army and of the Navy. When it is once conceded that it has some relation to a recognized authority, the court will not interfere with the exercise of this discretion.

As was said by the court in the case of *Purity Extract* v. *Lynch*, 226 U. S. 191:

> "With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it can not be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature—a notion foreign to our constitutional system."

AUTHORITY MAY BE CONFERRED UPON CONGRESS TO ENACT LEGISLATION BY A GROUP OF POWERS WHEN IT IS NOT CLEAR THAT SPECIFIC AUTHORITY IS CONFERRED BY ONE.

In 1870 the cases of *Knox* v. *Lee* and *Parker* v. *Davis* (12 Wall., 457), involving the same question, were argued at the court and are known as the Legal Tender cases. The court said:

> "It is not indispensable to the existence of any power claimed for the Federal Government that it can

be found specified in the words of the Consitution, or clearly and directly traceable to some one of the substantive powers expressly defined, or from all of them combined. It is allowable to group together a number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions."

Justice Bradley, in delivering a concurring opinion, said:

"It is absolutely essential to independent national existence that Government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril. In certain emergencies Government must have at its command not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential power of absolute control over the resources of the country. Its material of war, its munitions, equipment, and commissary stores must come from the industry of the country."

This decision reversed the decision of the court in *Hepburn* v. *Griswold* and adopted the dissenting opinion of Mr. Justice Miller in that case as the law. It was a plain, unequivocal, unambiguous declaration that Congress had passed these acts strictly as a necessity of war; that whether the power was an express one or an implied one really made no difference. The life of the Government was in jeopardy, and the doctrine of self-preservation was resorted to to maintain it. It is true that Justice Bradley, in his concurring opinion in the last cases, said that he "did not put this exercise by Congress as a war power, for other emergencies might arise even in time of peace when it would be necessary for Congress to exercise such power,"

yet he concurred in the opinion of Mr. Justice Miller and that of Mr. Justice Strong that, as the exercise of a war power, it was entirely within the power of Congress to pass the acts in question.

POWER TO MAKE CONSTITUTIONAL PROVISIONS EFFECTIVE.

Article 1, Section 8, gives power to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or any Department or office thereof." This provision of the Constitution has been criticised most severely. It is the clause which gives life and vitality to the Constitution. A more complete endowment of constitutional authority could scarcely have been made. Alexander Hamilton said: "It has been the source of much virulent, invective, and petulent declamation." Mr. Madison said: "Few parts of the Constitution have been assailed with more intemperance than this." The evident meaning of the language is that Congress shall have the authority to enact any law which may be necessary and proper in order that the powers which the Constitution has may be executed. The courts in the cases cited have construed this clause to mean that any or all of the powers designated in the Constitution may be made effective by the acts of Congress, and as the court said, *supra*, "It is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution or clearly and directly traceable to some one of the substantive powers." It is manifest from the construction

placed upon the whole Constitution by the court that in times of national peril and war emergencies Congress is authorized to enact legislation which will safeguard the nation. This has been done in numerous instances cited. The power of the Congress as set forth in the Constitution to declare war—to raise and support armies, to provide and maintain the navy—to make rules for the Government and regulations for the land and naval forces—to provide for the organizing, arming, and disciplining the militia and to provide for the common defense and general welfare are sufficient authority taken collectively if not separately for this legislation.

We respectfully submit that the authority for this act is clear and definite under the provision pointed out in Section 8, Article 1. But this theory is further strengthened by the principle set forth in the cases above mentioned. Congress repeatedly enacted laws to provide for the common defense and the general welfare—the Espionage Act, the Conscription Act, and many of the provisions relating to alien-enemy property and to alien enemies within our border. These laws have been sustained not because there is a specific provision in the Constitution authorizing them, but because they have a reasonable relation to some or all of the powers conferred upon Congress by the Constitution.

WAR EMERGENCY.

The acts above mentioned have been sustained because of the war emergency, which confronted the nation. The Government has always taken the position that when its existence was at stake and the national life jeopardized, Congress could exercise powers which were dormant in times of peace. Senator Knox stated the proposition con-

cisely. It was called to the attention of the committee on page 106, as follows:

> "The war powers of the Constitution, in my opinion, are dormant until the status of war is declared by Congress, and then they may be exercised without limitation or qualification, to the extent that the safety of the nation demands. Of this Congress is the judge, except as the Commander in-Chief of the Army and Navy in the actual conduct of the war and in the case of great emergency or dire necessity may be compelled to act."

Willoughby on the Constitution, p. 715, says:

> "The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. When dealing with the enemy all acts that are calculated to advance this end are legal. Indeed, the President, in the exercise simply of his authority as Commander-in-Chief of the Army and Navy, may, unless prohibited by Congressional statute, commit or authorize acts not warranted by commonly received principles of international law; and Congress may by law authorize measures which the courts must recognize as valid, even though they provide penalties not supported by the general usage of nations in the conduct of war. Thus, during the Civil War, in certain cases the provision by congressional statute for the confiscation of certain enemy property or land was enforced, though such confiscation was not in accordance with the general usage of foreign states.
>
> "Even in dealing with its own loyal subjects the power to wage war enables the Government to override in many particulars rights which in time of peace are inviolable."

The court said in the case of *Parker* v. *Davis*, 12 Wall. 457:

> "I do not say that it is a war power, or that it is only to be called into exercise in time of war; for other public exigencies may arise in the history of a nation which may make it expedient and imperative to exercise it. But of the occasions when, and of the times how long, it shall be exercised and in force, it is for the Legislative Department of the Government to judge."

Congress faced an emergency both with reference to the Army and to those who were to furnish the food, fuel, munitions, and man-power to support the Army. They had before them the statements of the Secretary of the Navy, hereinbefore mentioned, and of the great leaders of most of other great armies, as follows:

Earl Roberts said:

> "Thirteen thousand abstainers are equal to 15,000 non-abstainers. Give me a teetotal army and I will lead it anywhere."

Sir John French says:

> "Abstinence and self-control make a man more serviceable. If men want to see regiments, battalions, squadrons, and batteries, smart and efficient, if they have at heart the fame of the glorious regiment to which they belong, they must practice these great qualities of self-control and self-sacrifice."

Methuen says:

> "I appeal to these gallant men who represent this great empire to act their part as England expects them to do; and throw away from them the vile curse of drink, so that they may make themselves fit in body and nerve to face a foe that is as courageous as he is brutal in war."

Lieut. Gen. Sir Reginald Hart says:

> "As an officer, I support temperance because I know that officers and men who avoid drink are physically and mentally efficient, their nerves are stronger, they march better, there is far less sickness and crime, and their power of resistance is strengthened."

Admiral Sir J. R. Jellico says:

> "As regards straight shooting, it is everyone's experience that abstinence is necessary for efficiency. By careful and prolonged tests, the shooting efficiency of the men was proven to be 30 per cent worse after the rum ration than before."

In the light of all the facts and testimony which were placed before Congress and the nation when this legislation was enacted, it is difficult to reach a conclusion that the liquor traffic was not subject to the legislative power in question. The nation had reached a great crisis. The people were called upon to deny themselves not only luxuries but to limit to the utmost even the comforts and the necessities of life. Sugar, wheat, flour and other articles ordinarily used without restrictions were placed under Government control. The Government proceeded on the theory pronounced by Justice Bradley, when he said that the Government in a crisis may demand both the resources and lives of the people. This is what was actually done by the Government in this last war, when about four million men were called into the Army to sacrifice life itself if need be, to save this country, and help save the world from autocracy and its evil results. In such a crisis, the Government properly concluded that non-essentials should be eliminated first. The liquor traffic

was not only a non-essential, but it was a positive menace to the country.

This court years ago characterized the liquor traffic as "a source of crime and misery to society." Such a traffic was properly prohibited by Congress in its effort to keep the Army and Navy at their best, and to remove from the people an evil which decreased production and efficiency, and increased crime, disorder, and waste.

Congress acted within the authority imposed upon it to enact legislation to meet the crisis which was before them, and which continues until the war has actually ended and the demobilization of the Army terminated.

DOES WAR PROHIBITION VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION?

Appellee claims that the War Prohibition Act violates the Fifth Amendment, because it takes his property for public use without just compensation. It has been uniformly held by the courts that the liquor traffic is not entitled to compensation when it is prohibited by a law enacted by a recognized authority. The Government may prohibit the traffic entirely, or do less than enact total prohibition if it so desires. In other words, the plenary power to prohibit includes the lesser power to prohibit in part or conditionally. See *Lloyd* v. *Dollison*, 194 U. S. 445; *Rippey* v. *Texas*, 193 U. S. 504; *American Express* v. *Beer*, 65 Southern 581; *State* v. *U. S. Express Co.*, 145 N. W. 450; *State* v. *Doe*, 139 Pacific, Rep. 1170.

Congress had plenary power to prohibit the beverage traffic entirely. It did not prevent the appellee from withdrawing his liquor under the provisions of this act, for export or non-beverage purposes. Congress

could have gone farther than it did. The failure of Congress to use its entire power furnishes no basis for a complaint by the appellee. Compensation in either instance is not recognized by the law.

The outstanding case on this question was decided years ago by the United States Supreme Court in *Mugler* v. *Kansas* (123 U. S. 623). December 5, 1887, the United States Supreme Court decided: 'The power which States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not, and—consistently with the safety of organized society—can not be burdened with the condition that the State must compensate such individual owners for pecuniary losses they sustained by reason of their not being permitted by noxious use of their property to inflict injury upon the community.' " (123 U.S., p. 623, Kansas cases.)

The Kansas cases were submitted to the court upon the following agreed statement of facts: First, That said buildings were erected by them prior to the adoption by the people of Kansas of the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors for other than medicinal, scientific, and mechanical purposes, and before the passage of the prohibitory liquor statute of that State.

Second. That the buildings were erected for the purpose of manufacturing beer and can not be put to any other use, and if not used they will be of little value.

In the light of this decision every liquor dealer who has engaged in the liquor business for the last 30 years has done so with full notice that he has no legal claim for compensation. This decision has been followed by every

State supreme court, and has been reaffirmed many times by the United States Supreme Court.

If the State under its police power may prohibit intoxicating liquors without compensation, then the Federal Government under the above constitutional provisions in maintaining and protecting her Army and Navy in a war emergency certainly has powers as broad. And if the Government has the greater power of entirely destroying the use of property without compensation, it certainly has the lesser power of providing by law that the sale of such liquors shall only be permitted for certain, specified, legitimate purposes.

DOES THE EIGHTEENTH AMENDMENT PERMIT THE MANUFACTURE AND SALE OF LIQUOR FOR ONE YEAR AFTER RATIFICATION?

The appellee urges that the 18th amendment permits the manufacture and sale of liquor for one year from date of ratification or from January 16, 1920. Section (1) of Article 18 provides:

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

There is nothing in this provision which gives a guarantee to the liquor traffic that it can continue during the interim of one year, if the traffic is prohibited by some other unit of government or by some other legislative authority. This provision of the Constitution and code

enacted to make it operative does not take effect until January 16, 1920. The only guarantee that Article 18 carries for the liquor traffic is that the article in question will not become operative until the date mentioned. If the logic of the appellee is sound then those villages, township, cities, counties, and States that have voted dry since January 16, 1919, have exceeded their authority and those laws would be void. Many States adopted constitutional prohibition and it did not become operative for one year or more after its adoption. In the interim subdivisions of the State would vote dry under local-option laws or municipal councils would prohibit the traffic by ordinances. This principle of legislation has been uniformly sustained through the years. In other words, where one unit of government adopts prohibition to go into effect at a fixed time it does not prevent other units of that government from prohibiting the traffic at an earlier period nor does it prohibit the legislative department of the same unit of government from acting at an earlier period if there is no special or definite guarantee against the other units of government from acting upon the subject-matter under their former recognized authority.

A resolution to submit the Amendment was introduced in 1916. One partial War Prohibition Act was adopted in 1917, before the resolution to submit the Amendment was passed. Congress was cognizant of its power to enact temporary War Prohibition, as well as its power to submit permanent Prohibition. There is nothing in the 18th amendment or in the records which show that Congress ever contemplated denying other legislative authorities from acting within the scope of their existing

power. If Congress had intended to prevent all the village, city, county, State, and Federal authorities from acting under the authority they then possessed, or intended to repeal their power to act, it would have been written into the proposed amendment. A suggestion of that kind would have received scant support by Congress that favors prohibition legislation by a very large majority. Repeals by implication are not looked upon with favor. (*Harrington* v. *U. S.*, 11 Wall 356; *U. S.* v. *Lenois*, 17 How. 85.)

To claim that these other legislative agencies have no right to function because a constitutional provision prohibiting the liquor traffic goes into effect a year later is ingenious but is contrary to every consideration of sound public policy. The beverage liquor traffic in the nation will be prohibited by the 18th amendment and the Federal Prohibition Code, January 16, 1920. It could have been prohibited by local or State action the day after the 18th amendment was ratified. If this is correct, then the 18th amendment gives no such constitutional guarantee of extended life as claimed by the appellee. Prohibition has been put into effect by many units of government since January 16, 1919, and no objection has been made to it by the courts. If this can be done legally, then Congress can use its war powers to meet an emergency in the interest of the nation's welfare. Even a license gives the traffic no property or vested right.

It is at best a temporary permit which may be revoked at any time. *Stone* v. *Mississippi*, 101 U. S. 814; *Kresser* v. *Lyman*, 74 Fed. 765; *Moore* v. *Indianapolis*, 120 Ind. 483, 22 N. E. 424; U. S. R. S., Sec. 3243. The payment

of the U. S. liquor tax not only gives no right to a liquor dealer to continue in the trade, but it is used as evidence against him when he sells in violation of law.

To claim immunity from other prohibition laws because the Constitution does not prohibit the trade until 1920, is like claiming immunity from arrest and conviction for counterfeiting in a State because a national law against counterfeiting does not take effect for a year. The traffic has always been in a class by itself to the treatment of which there is no analogy in the law, even in times of peace. It never has had special privileges.

This court recently said in the case of *The James Clark Distilling Company* v. *The Western Maryland Railway Company*, 242 U. S. 311:

> "The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

United States District Judge Carpenter on November 17, in deciding this point, said:

> "Congress had the power before the 18th amendment was passed to make police regulations in the aid of war. This amendment certainly did not destroy

that right. If that amendment had been passed in January, 1917, with the one year of grace for the liquor interests to readjust themselves and their business, could anyone in reason contend that Congress had not the power in April, 1917, to prohibit the manufacture, sale, or even use of ardent spirits?"

The liquor traffic never has had any "inherent right to exist" in a State or in the nation. It is here by sufferance only. It has always been treated more as a trespasser than as an invited guest. To claim that guarantees have been extended to it by implication may be novel, but we do not believe it has any claim on the court. It is not based on reason, precedent, or justice.

IS THERE AUTHORITY FOR THIS ACT TO CONTINUE IN EFFECT DURING THE PERIOD OF DEMOBILIZATION?

The obligation on the part of Congress to support the Army by conserving man-power, food, fuel, etc., is not limited to the actual time of war. The power of Congress to support the Army continues until the time that the Army is actually demobilized. The necessity for conserving the food and the fuel and the man-power is practically as great during that period as during the period of actual war. It represents one of the most trying periods of national existence to supply food and other materials for the Army and for those who are supporting it during the transition. If Congress has the power, as it clearly has, to furnish that Army with food, shelter, clothing, fuel, and transportation until the Army is demobilized, then the War Prohibition Act which conserves those things which are essential to the support of the Army and Navy is clearly constitutional.

The war has not terminated until the peace treaty is signed. His Honor, Judge Learned Hand, in a very able and convincing opinion in the case of the *Commercial Cable Company* v. *Burleson*, held:

> "It is a treaty which terminates the war (The Protector, 12 Wall 700; *Hijos* v. *United States*, 194 U. S. 315). An armistice effects nothing but a suspension of hostilities; the war still continues. It is true that a war may end by the cessation of hostilities or by subjugation, but that is not the normal course, and neither had hostilities ceased nor had the enemy been subjugated in the sense in which that term is used. There were still military operations; the armistice has not been carried out, and after it was, armed forces of the United States were in occupation of enemy territory, and were in European and Asiatic Russia, where, indeed, they still remain."

In deciding another case, *Scatena* v. *Caffey*, Judge Augustus Hand sustained the constitutionality of the War Prohibition Act during the period of demobilization, said:

> "I think the valid exercise of the war power depends not merely upon whether the means employed is adapted to aid in the immediate prosecution of the war, but also whether it can be said to have any substantial relation to conditions immediately growing out of the termination of hostilities. So long as the treaty of peace is not ratified there is some chance of the resumption of hostilities, though I place but the slightest weight upon this. A war emergency, however, of serious import arises in respect to the period of demobilization. During that period there has been and still is a stream of enlisted men coming into and remaining within the United States. The great stimulus engendered by the popu-

lar excitement which attended the war and by their expectation of having to combat their country's foes has disappeared and a more or less purposeless and dull routine has followed as the inevitable lot of the young soldiers. Under such circumstances men are especially subject to all the temptations which a lack of immediate definite purpose, as well as a certain relaxation of discipline, are likely to entail. During the same period the country has been filled with other men but recently discharged from military service, a considerable number of whom are said in the moving papers before me to lack employment. There is, besides all this, the general restlessness which has apparently always followed the termination of a great war. Under such circumstances it can strongly be argued that the free use of stimulants may have peculiar dangers to the community. At all events, I do not see how it can be fairly said that no emergency exists directly growing out of the war, or that such emergency may not be affected by such a thing as the liquor traffic.

* * * * * * *

"I think it plain from the terms of the act that Congress had among its objects the regulation of the liquor traffic during the period of demobilization. That was a critical period; more critical in some respects than that of active hostilities. If Congress thought that drastic prohibition during a period when there would probably be considerable lack of employment and restlessness would be advantageous, it was within the war power, in my opinion, for it to adopt legislation which would care for these conditions arising so immediately out of the war itself."

From every view point the necessity arising out of the war for prohibiting the beverage liquor traffic during demobilization is apparent.

The aftermath of every war has witnessed unrest and disorder. It is more intense after this war because of the magnitude and length of the conflict. As long as there is a necessity for saving food, fuel transportation, and conserving man-power as a result of this war, the act in question is a proper use of the war power. To have fifty million gallons of whiskey forced on the market during this time of unrest, disorder, and occasional mob violence would be a crime against civilization and orderly government. We believe that a proper construction of the law will prevent this and avert a great calamity in the nation.

THE PRESUMPTION OF CONSTITUTIONALITY.

Unless there is such conflict between the law and the Constitution that can not be reconciled, it should be sustained.

In *United States* v. *Harris*, 106 U. S. 635, 27 L. Ed. 290, Mr. Justice Woods, speaking for the court, said:

> "Proper respect for co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."

In *A. T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. Ed. 909, Mr. Justice McKenna said:

> "It is also a maximum of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it transcended its powers."

In *Brown* v. *Walker*, 161 U. S. 590; 40 L. Ed. 819, Justice Brown, speaking for the court, says:

> "That the statute can be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supported fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not hold the law invalid unless, as was observed by Mr. Chief Justice Marshall in *Fletcher* v. *Peck*, 10 U. S. 88, 3 L. Ed. 162, the 'opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.' "

The War Prohibition Act was adopted by Congress in response to the overwhelming sentiment of the nation in favor of preventing the waste of food, fuel, transportation facilities, and man-power caused by the liquor traffic. Congress believed that it was well within its power with all the evidence it had before it to adopt this important legislation. If the act, therefore, is in reasonable relation to any recognized war power of Congress, it is valid. Whether it is a wise act or not should not enter into the construction or the determination of the validity of the measure. Congress had not only the authority, but the obligation to support the Army and the Navy in every way possible. The Government appealed to all to save food and win the war. Patriots responded, and saved food by the crumb, while the brewers wasted it by the ton. Manufacturers could not secure cars to send their products to purchasers, but the liquor dealers used thousands of refrigerator cars which were needed to carry essential food products.

The coal supply was short. Factories, churches, and other buildings were closed for lack of coal, while dealers worked overtime and used large quantities of fuel needed in more essential industries. Field, factory, and farm were appealing for help while they boasted of the hundreds of thousands whom they employed in this non-essential industry. Evidence accumulated from every quarter that the man-power of the nation was made less efficient and was crippled by liquor. Congress faced this situation and decided that this nonessential industry should be prohibited as a war measure until demobilization was completed and normal peace conditions were established. The date of operation of the War Prohibition Act prohibiting the sale of liquors was fixed months ahead in order to give liquor dealers an opportunity to adjust their business relations. See Congressional Record, Sixty-fifth Congress, Aug. 28, 1919, No. 200, page 10475. The fact that Congress did not prohibit entirely the manufacture and sale earlier does not present any reason or argument against the validity of the act. The power of Congress to support the Army and the Navy is complete until the war ceases and the Army is demobilized. This act having a reasonable relation to that power and other war powers, we respectfully submit it should be sustained.

Respectfully submitted.

WAYNE B. WHEELER,
R. C. MINTON,
Attorneys, Amici Curiæ.

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WAR-TIME PROHIBITION CASE.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 398. 589.

ELWOOD HAMILTON, Collector of Internal Revenue,
Appellant,

vs.

KENTUCKY DISTILLERIES AND WAREHOUSE CO.
Appellee.

Appeal from the District Court of the United States for the Western District of Kentucky.

BRIEF FOR APPELLEE

In support of the contention that the War-Time Prohibition section of the Act of November 21, 1918, is unconstitutional as regards pre-existing liquor because in violation of the Fifth Amendment and has ceased to be operative.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Appellee.

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WAR-TIME PROHIBITION CASE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

ELWOOD HAMILTON, COLLECTOR, ETC.,
Appellant,

vs.

KENTUCKY DISTILLERIES & WAREHOUSE CO.,
Appellee.

Appeal from the District Court of the United States for the Western District of Kentucky.

BRIEF FOR APPELLEE.

This appeal involves only two questions (1) the constitutionality, under the "just compensation" clause of the FIFTH AMENDMENT, of so much of the Agricultural Act of November 21, 1918 (herein called the War Prohibition Act), as prohibits the sale of pre-existing stocks of whisky, or its removal from bond, after June 30, 1919, and (2) whether that act has, by its own terms, ceased to be operative

by reason of "the conclusion of the present war" and "the termination of demobilization."

By the War Prohibition Act of November 21, 1918 (introduced on May 6, 1918, at the very crisis of the War, but not adopted for more than six months, nor until ten days after the armistice) it was provided that

> "for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy"

it shall be unlawful, after June 30, 1919, to sell, or to withdraw from bond, any whisky

> "until the conclusion of the present war and *thereafter* until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States."*

The Kentucky Distilleries & Warehouse Company (herein called Kentucky Co.), has, for more than four years, owned very large amounts of whisky, which to present the questions in this case, may be described as follows (Rec., 5-7):

1. More than 15,000 gallons of whisky, on

*The statutory prohibition is confined to "beverage purposes" which will be assumed as implied in all our discussions.

which the company has heretofore paid the tax of $6.40 a gallon ($102,169.60); of which $3.20 a gallon (more than $50,000) it was compelled to pay as late as September 24, 1919, under the increased tax law of February 24, 1919. This whisky is called "floor stock" and is in the company's possession. The Kentucky Co. and its branches were compelled to pay as increased taxes to the Government, since February 24, 1919, under the Revenue Act of that date $993,630.12. (Rec., 7.)

2. 22,157 barrels, containing more than 1,091,000 gallons and costing more than $1,000,000 (of which about 18,000 barrels are in bonded warehouses in Kentucky), upon which the Internal Revenue tax has not yet been paid.*

On October 10, 1919, the Kentucky Co. tendered to the Collector of Internal Revenue the sum of $132,331.52, being the tax upon 534 barrels of the whisky last above described, and sought to withdraw it from bond, in order to sell the same in the United States for beverage purposes. (Rec., 8, 20-21.)

The Collector refused to accept the money

*In addition to its own holdings, the Kentucky Co. has in its warehouses 215,846 barrels of whisky (containing over 10,000,000 gallons) costing far in excess of $5,000,000, belonging to thousands of customers, banks, etc., for which its negotiable warehouse receipts are outstanding. All of this whisky was made several years before the war and will be a complete loss to its owners if the War Prohibition Act is sustained. The Kentucky Co. has given to the U. S. over $10,000,000 of warehouse bonds to secure the payment of the revenue tax, all of which bonds are now in force. (Rec., 7, 9, 10.)

or to permit the withdrawal of the whisky from bond. (Rec., 21.)

Thereupon, the Kentucky Co. filed this suit to compel the Collector to accept payment of the tax and to permit the withdrawal of the whisky from bond, upon the ground that the War Prohibition Act of November 21, 1918 (under which the Collector assumed to justify his refusal) is (*a*) unconstitutional in that it violates the FIFTH AMENDMENT by taking the company's private property for public use without making any provision for just compensation therefor, and (*b*) inoperative as both the war and demobilization have terminated. (Rec., 1-24.)

The Government's motion to dismiss the bill was overruled and a final decree was rendered in favor of the plaintiff (Rec., 26); to review which this appeal was taken.* (Rec., 28-29.)

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*The italics used in the quotations from the decisions of the courts are our own.

SUMMARY OF POINTS DISCUSSED.

1. **Congress has no power to prohibit the sale of whisky within a State, except under its war powers (this page, infra).**

2. **The War-Time Prohibition Act is unconstitutional because it violates the Fifth Amendment, in that it takes pre-existing private property for public use without compensation. (p. 18, infra.)**

3. **The War-Time Prohibition Act has, by its own terms, ceased to be operative. (p. 48, infra.)**

FIRST POINT.

Congress has no power to prohibit the sale of whisky within a State, except under its War Powers.

The Constitution contains no grant of power, express or implied, by which Congress can ordinarily either prohibit, or authorize, the sale of liquor within a state. This was recognized by the fact that it was necessary to adopt the EIGHTEENTH AMENDMENT in order to establish prohibition within the states, which Congress was previously powerless to accomplish.*

*Of course Congress can control the sale of liquor in certain exceptional cases such as on Government premises, Indian reservations, etc.

It has been repeatedly held that, by virtue of the TENTH AMENDMENT, as well as by the whole scheme of the Federal Government as one of enumerated powers, Congress has no police power by which it can (1) abolish the liquor traffic within a State or (2) otherwise control matters of purely internal concern, because

I. *By the Tenth Amendment the States reserved to themselves the police power over the liquor traffic with the right to abolish its future manufacture, sale or possession.*

The TENTH AMENDMENT provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

It has been repeatedly held that the states have reserved unto themselves the entire police power over the liquor traffic.

(*a*) *The States' police power over the liquor traffic is absolute and exclusive.* Notwithstanding the fact that the Federal Government has raised a large portion of its revenue, amounting to hundreds of millions of dollars annually, by taxing intoxicating liquors, the States, under their reserved powers, have the

right absolutely to prohibit the manufacture or sale of liquor within their respective limits and thus withdraw an enormous source of revenue from the Federal Government.

Prior to the adoption of the FOURTEENTH AMENDMENT, the regulation, or the total prohibition, of the liquor traffic was admittedly within the police power of the States, subject to no limitations whatever, except those imposed by the State Constitutions, or by the general principles supposed to limit all legislative power. (*Bartemeyer* v. *Iowa,* 18 Wall., 129, 132.)

The FOURTEENTH AMENDMENT made no change in the law in that respect. In a long series of cases, of which *Bartemeyer* v. *Iowa,* 18 Wall., 129, *Beer Co.* v. *Massachusetts,* 97 U. S., 25, *Mugler* v. *Kansas,* 123 U. S., 623, and *Kidd* v. *Pearson,* 128 U. S., 1, are conspicuous examples, this Court has upheld the absolute power of the States to prohibit (*a*) the *future* manufacture of liquor (even for one's personal use), (*b*) the sale of liquor acquired *after* the passage of the act, or (*c*) the *use* of property for either of such purposes.

In *Crowley* v. *Christensen*, 137 U. S., 86, *Purity Extract Co.* v. *Lynch*, 226 U. S., 192 *Eberle* v. *Michigan*, 232 U. S., 700, *Crane* v. *Campbell*, 245 U. S., 304, and *Barbour* v. *Georgia*, 249 U. S., 454, it was held that on account of the evils shown by experience to be consequent upon the use of liquor, a State has the power to regulate, or absolutely to prohibit, the manufacture, gift, purchase, sale, transportation, or even mere possession of liquors for personal use, within its borders; and that in the exercise of such power the State might adopt such measures as were reasonably appropriate to render the exercise of the power effective, including the right to prohibit the sale of nonintoxicating liquors (innocuous in themselves) on account of the artifices used in selling intoxicants under the guise of innocent beverages.

The foregoing cases establish the unlimited power of the states with respect to the liquor traffic within their borders.*

(*b*) *The depreciation of brewery or distillery properties as an incident to prohibition.*

*Subject only to the possible qualification as to liquor actually in existence *before* the prohibitory legislation was passed. (See page 10, *infra*.)

If, as the result of the States' power to abolish the manufacture and sale of liquor, existing breweries or distilleries (bought or built at a time when the manufacture of liquor was perfectly lawful) are reduced in value, the owners thereof are not entitled to any compensation therefor, nor is such prohibitory legislation in violation of the "due process" clause of the FOURTEENTH AMENDMENT.

This is because (1) the FOURTEENTH AMENDMENT was never intended to impose restrictions upon the reserved powers of the States to protect their citizens; (2) the owners could continue to use the property for lawful purposes but were only forbidden to use it for purposes prejudicial to the public interest; and (3) although the plants were acquired at a time when the manufacture of liquor was permitted, the State did not thereby agree that its legislation on the subject of liquor would remain unchanged, but the brewers and distillers made their investments with full knowledge of the fact that the State might, in the future, declare such use of the property unlawful, and, if so, there was no deprivation or taking of property within the meaning of the FOURTEENTH AMENDMENT. (See *Mugler* v. *Kansas*, 123 U.

S., 623, *Murphy* v. *California,* 225 U. S., 623, *Eberle* v. *Michigan,* 232 U. S., 700, 707.)

(*c*) *The States' power with respect to pre-existing liquor.* It is still an open question whether a State can make unlawful the possession, use or sale of liquors lawfully acquired (as in the present case) *before* the passage of the prohibitory statute.

This Court has, in *Bartemeyer* v. *Iowa,* 18 Wall., 129, *Beer Co.* v. *Massachusetts,* 97 U. S., 25, *Eberle* v. *Michigan,* 232 U. S., 700, 706, and *Barbour* v. *Georgia,* 249 U. S., 454, 459, expressly reserved for decision the question (when it should actually arise) whether, even under the police power, a State can pass a prohibition law which will make unlawful the possession, use or sale of liquor lawfully acquired *before* the passage of such law. It is still an open question whether it is "due process" of law for a State, having once allowed a person to acquire property by the investment of money therein, to make the further possession or sale of such liquors unlawful, upon the ground that the preservation of general public morals and safety so requires. It can of course do so if it makes just compensation for the property so taken.

The leading State Court case upon this subject is that of *Wynehamer* v. *People,* 13 N. Y. 378, decided in 1856, where the court in an exhaustive opinion held that the Act passed April 9, 1855 by the legislature of New York, which prohibited the sale of intoxicating liquors owned and possessed by persons within the State of New York at the time the act took effect, was unconstitutional because it violated the provision of the New York constitution which declared that no person shall be deprived of life, liberty or property without due process of law. The reasoning of the court on principle would seem unanswerable.

The distinction between the depreciation of plants and the question so reserved, is that while a man has *no* vested right to *use* his property in a *particular occupation* declared by the police power to be thereafter harmful to the community, nevertheless he *does have a vested right in the property itself;* and if the State makes unlawful the possession, use or sale of such property, it constitutes a taking thereof.

In the language of the court, in the Wynehamer case, *supra,* at page 387:

"It must follow that any scheme of legisla-

> tion which, aiming at the destruction of this use, makes the keeping or sale of them as a beverage, in any quantity and by any person, a criminal offense—which declared them a public nuisance—which subjects them to seizure and physical destruction, and denies a legal remedy if they are taken by lawless force or robbery, must be deemed, in every beneficial sense, to deprive the owner of the enjoyment of his property."

From this reference to the leading decided cases, it is clear that the States reserved to themselves the power to control, within their limits, the manufacture, sale, and possession of intoxicating liquors; that all of the prohibitory legislation heretofore considered by this Court, has been that of States acting under the powers reserved by the TENTH AMENDMENT; and that these cases do not authorize Congress to act in the matter, except that Congress can waive the interstate character of liquor in order to subject it to the laws of a state when once introduced therein, or can prohibit its transportation to a state where its possession is prohibited. (*In re Rahrer,* 140 U. S., 545; *Clark Distilling Co.* v. *West'n Md. Ry. Co.,* 242 U. S., 311, 323, and cases there cited.)

II. *Congress has no power, in peace time, to prohibit the sale of whisky.*

As a corollary to the proposition that the States have reserved to themselves the power over the liquor traffic within their borders, it follows that Congress has no such power. As was aptly said in *In re Rahrer,* 140 U. S., 545, 554, with respect to this very power of prohibiting the sale of liquor:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, *not surrendered by them to the general government* nor directly restrained by the Constitution of the United States, and *essentially exclusive.* • • •
>
> In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, *and cannot be assumed by the National Government,* and that in this respect it is not interfered with by the Fourteenth Amendment. *Barbier* v. *Connolly,* 113 U. S., 27, 31."

To the same effect see *Fertilizing Co.* v. *Hyde Park,* 97 U. S., 659, 667.

In *Matter of Heff,* 197 U. S., 488, 505, it was held that, notwithstanding the United

States' wardship over Indians and the consequent unlimited right to legislate for their protection from liquor, when once an Indian became a citizen of the United States (as under certain conditions he might become), Congress lost the power to legislate as to him with respect to the use of liquor in a state and that an Act of Congress prohibiting sales of liquor to Indians did not apply to an Indian who had become a citizen of some state.

Mr. Justice BREWER said:

> "The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power *it is within the domain of State jurisdiction.* * * *
>
> It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State *would be an invasion of the State's jurisdiction* and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters *no such thing as a divided sovereignty.* Jurisdiction

is vested entirely in either the State or the Nation and *not divided between the two.*"

In *Hammer* v. *Dagenhart,* 247 U. S., 251, 273-276, in holding the Federal Child Labor Law unconstitutional, this Court said:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and *not* to give it authority to control the States in their exercise of the police power *over local trade* and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution. * * *

The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon,* 7 Wall. 71, 76. The power of the States *to regulate their purely internal affairs* by such laws as seem wise to the local authority is inherent and *has never been sur-*

rendered to the general government. New York v. *Miln,* 11 Pet. 102, 139; *Slaughter House Cases,* 16 Wall. 36, 63; *Kidd* v. *Pearson, supra.* * * *"

In *Keller* v. *United States,* 213 U. S., 138, 144, 148, an Act of Congress making it a felony to harbor an alien prostitute within three years after entry into the United States, was held unconstitutional as a regulation of a matter within the police power reserved to the States, and not within any power delegated to Congress.

The Court said:

"While the keeping of a house of ill fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress, or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, *that power is reserved to the States,* for there is in the Constitution *no grant thereof to Congress.* * * *

That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution *no grant to Congress of the police power.*"

Therefore, it necessarily follows that the War Prohibition Act of November 21, 1918, cannot, in the slightest degree, be sustained by

reference to any supposed congressional power, in peace time, over the liquor traffic.

III. *Under the war power, Congress had the right, temporarily to regulate and suppress the sale of liquor.*

By the Constitution, Art. 1, Sec. 8, it is provided that:

> "The Congress shall have power * * * to declare War. * * * To raise and support Armies. * * * To make rules for the government and regulation of the land and naval forces. * * * To make all Laws which shall be necessary and proper, for carrying into execution the foregoing Powers. * * *"

In order to guard and promote the health, welfare and efficiency of the men composing the army and navy, and to increase the efficiency of the workers in the production of arms, munitions, ships, food and clothing for them, Congress has the right temporarily to regulate the sale of liquor, and, if reasonably necessary to accomplish such objects, to forbid its sale. (*McKinley* v. *U. S.*, 249 U. S., 397, 399; *Selective Draft Law Cases*, 245 U. S., 366; *Schenck* v. *U. S.*, 249 U. S., 47, 52.)*

*The extent of the war power is illustrated in the following cases: *Grancourt* v. *U. S.*, 258 Fed., 25; *U. S.* v. *Casey*, 247 Fed., 362; *Pappens* v. *U. S.*, 252 Fed., 55.

No one will seriously dispute the power of Congress to suppress houses of ill fame or saloons as tending to interfere with the most efficient prosecution of the war, or to take over the railroads, steamships, telephones or telegraph lines in order to carry on the war.

Therefore, under the war power, Congress could undoubtedly prohibit (1) the future manufacture of whisky and (2) the sale of existing whisky for beverage purposes until the emergency was over which called the power into existence.

SECOND POINT.

The War-Time Prohibition Act is unconstitutional because it violates the Fifth Amendment, in that it takes pre-existing private property for public use without just compensation.

1. *The exercise of the war power is subject to the restrictions contained in the* FIFTH AMENDMENT.. The war power is contained in the original Constitution. The amendments were adopted in order to prevent the Government from assuming the power to trespass upon those rights of persons and property which were believed to be inalienable and are set out in the first Ten Amendments.

It has been held in many cases that each of the great substantive powers of Congress are qualified by, and subject to, the restrictions of the FIFTH AMENDMENT, as, for example, the power to exclude aliens (*Wing Wong* v. *U. S.*, 163 U. S., 228, 234, 237, 238); the power to tax (*U. S.* v. *R. R. Co.*, 17 Wall., 322; *Boyd* v. *U. S.*, 116 U. S., 616); the power to regulate commerce (*Monongahela Navigation Co.* v. *U. S.*, 148 U. S., 312, 336; *U. S.* v. *Joint Traffic Ass'n.*, 171 U. S., 505, 571; *U. S.* v. *Cress*, 243 U. S., 316, 326; *U. S.* v. *Lynah*, 188 U. S., 445, 471; *Adair* v. *U. S.*, 208 U. S., 161, 180; *Carroll* v. *Greenwich Insurance Co.*, 199 U. S., 401, 410); and the war power (*Ex parte Milligan*, 4 Wall., 2; *Ochoa* v. *Hernandez*, 230 U. S., 139, 153; *U. S.* v. *Delaware & H. Co.*, 164 Fed., 215, 231; *McCray* v. *U. S.*, 195 U. S., 27, 61).

In *Ex parte Milligan*, 4 Wall., 2, a man was arrested during the Civil War, tried by a military commission, and condemned to be hanged. It was held that even during the stress of the Civil War, the guarantees of the Fourth, Fifth and Sixth Amendments for the protection of the citizen were in force even as against the

war powers of the Government; and that the accused was entitled to a trial by jury.

After quoting the 4th, 5th and 6th Amendments, the Court said (p. 120):

> "These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and *so jealous were the people that these rights, highly prized, might be denied them by implication,* that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, *it would never have been ratified.*
>
> Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now,* after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future."

This Court then continued, in language directly applicable in the present case:

> "The Constitution of the United States is a law for rulers and people, *equally in war and in peace*, and covers with the shield of its protection all classes of men, *at all times*, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be *suspended* during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false."

This Court rejected the contention that in a time of war a military commander could, within the lines of his military district, suspend civil rights (when the courts were open) and in words, which are equally applicable to the present effort by Congress to evade Constitutional guaranties under the plea of wartime necessity said (pp. 124-5):

> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was

deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and *has no right to expect that it will always have wise and humane rulers,* sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, *the dangers to human liberty are frightful to contemplate.* If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary dis-

turb, except the one concerning the writ of *habeas corpus.*"

This doctrine authoritatively established in *Ex parte Milligan,* has been followed by many courts, as appears in the citations collected in Volume 6, Rose's notes on the United States Reports, revised edition, page 4. Among the State Court cases is that of *Johnson* v. *Jones,* 44 Ill. 142 (decided in 1867) where the court laments the necessity of holding unlawful the exercise of an assumed war power by the then late President Lincoln, who had caused a United States Marshal during the Rebellion to arrest a citizen of Illinois without process.

The court, at pages 155, 156, stated the rule to be as follows:

> "The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the constitution and is inconsistent with every principle of civil liberty and free government."

In *Monongahela Navigation Co.* v. *U. S.,* 148 U. S., 312, 336, it is said:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have here-

> tofore quoted. CONGRESS HAS SUPREME CONTROL OVER THE REGULATION OF COMMERCE, BUT IF, IN EXERCISING THAT SUPREME CONTROL, IT DEEMS IT NECESSARY TO TAKE PRIVATE PROPERTY, THEN IT MUST PROCEED SUBJECT TO THE LIMITATIONS IMPOSED BY THIS FIFTH AMENDMENT, AND CAN TAKE ONLY ON PAYMENT OF JUST COMPENSATION. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. * * * Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. * * *"

To the same effect is *McCray* v. *United States,* 195 U. S., 27, 61.

It necessarily follows that if, in the exercise of the war power, private property is taken, the owner thereof is entitled to just compensation therefor. This is guaranteed to him by the FIFTH AMENDMENT.

Except the War-Time Prohibition Act now under consideration, all other Acts of Congress providing, under the war power, for the taking of property, contain provisions for mak-

ing just compensation to the owners thereof. (See p. 36, *infra.*)

2. *Whisky is property and when taken for public use, is entitled to the protection of the* FIFTH AMENDMENT. Whatever may be the ultimate decision of the question reserved in *Bartemeyer* v. *Iowa* respecting the power of a State to prohibit the sale of intoxicating liquor existing before the passage of the prohibitory statute, certainly so far as the Federal Government is concerned, whisky is property which the United States can no more take without first giving just compensation, than it could take cotton or tobacco. This is so because generally speaking, the United States has no concern with respect to the character of intoxicating liquors or any police power with respect thereto.

In *Leisy* v. *Hardin,* 135 U. S., 100, 110, the Court said:

> "That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied."

In *Wynehamer* v. *People,* 13 N. Y., 378, already referred to, it was said (pp. 383-384):

> "In determining the question, whether the 'Act for the prevention of intemperance, pauperism and crime' was an exercise of power prohibited to the legislature, an accurate perception of the subject to which it relates is the first requisite. It is, then, I believe, universally admitted that when this law was passed intoxicating liquors, to be used as a beverage were *property* (the italics are the court's) in the most absolute and unqualified sense of the term; and, as such, as much entitled to the protection of the constitution as lands, houses or chattels of any description."

After quoting, on page 386, supporting language from Blackstone's Commentaries, the Court continues thus:

> "While this language of the English commentator by no means expresses the full force of the limitation imposed upon the legislature by the people of this state in their written constitution, it contains, nevertheless, a vindication of the sanctity of private property, as against theories of public good, eminently applicable to our own condition and times. In a government like ours, theories of public good or public necessity may be so plausible, or even so truthful, as to command popular majorities. But whether truthful or plausible merely, and by whatever numbers they are assented to, there are some absolute private

> rights beyond their reach, and among these the constitution places the right of property."

In *Commonwealth* v. *Campbell,* 133 Ky., 50, the Court said:

> "As spiritous liquor is a legitimate subject of property, its ownership and possession cannot be denied, when that ownership and possession is not in itself injurious to the public. The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution."

To the same effect see *Barber* v. *Commonwealth,* 182 Ky., 200.

The laws of Kentucky provide for whisky warehouses, for the taxation of whisky and of the storage while the whisky is in a warehouse (Ky. Stat., Sec. 4768).

In *Commonwealth* v. *Kentucky Distilleries & Warehouse Co.,* 143 Ky., 314, it was held that storage upon whisky was property and taxable as such. The opinion contains many definitions of property, among which the following are instructive:

> "The term 'property' is a generic term of extensive application; and while strictly

speaking, it means only the right which a person has in relation to some thing, or that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, it is frequently used to denote the subject of the property, or thing itself, which is owned, or in relation to which the right of property exists. * * *

The term is therefore said to include everything which is subject of ownership corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession, everything which has an exchangeable value or which goes to make up one's wealth or estate * * * * * * the word 'property' as used in the revenue statute means everything of value that a person owns, that is or may be the subject of sale or exchange, or that when offered for sale will bring some price."

Whisky is the subject of larceny, gift, sale, devise, inheritance, taxation, and indeed possesses every attribute of property that is possessed by any other article to which that name can be given.

Kentucky had the power to determine for itself what is, and what is not, a proper subject for ownership by its people. Whisky being recognized as property by the State, there is no power in the Federal Government to say

that it shall not be considered as property. A mere statement of the proposition is all that is needed but it may be observed that the Federal Government itself has for many years recognized whisky as property by deriving an enormous revenue from taxing it, by having an immense governmental bureau for the purpose of guarding and protecting it and prosecuting those who interfere with whisky as property.

It is not material to inquire whether some States in the exercise of their police powers, may or may not have outlawed whisky and decreed that it shall not be considered as property, but shall be considered on the same basis as impure food, gambling devices, or other articles of a prohibited character.

In Kentucky—and it is there that the question arises—whisky is as much property, and the owner thereof is as much entitled to the constitutional protections given it as would be the case with respect to war munitions, tobacco, cotton, or oil.

3. *The War-Time Prohibition Act takes the Kentucky Company's private property for public use, but makes no provision for just compensation to the owner. Therefore, the*

Act is unconstitutional. All the whisky in question was made by the Kentucky Co. years before the war began; has belonged to it continuously ever since its original manufacture; and consists of two classes, to wit (*a*) 15,000 gallons in the company's exclusive possession, on which it has paid $102,169.60 taxes, of which $51,084.80 was exacted and received by the Government on September 24, 1919, under the retroactive increased tax law of February 24, 1919, and (*b*) 22,157 barrels (1,091,253 proof gallons) in bonded warehouses under the Government's exclusive control, and for the taxes on which the United States holds the company's bonds, amounting to over ten millions of dollars.*

This whisky being property, has it been "taken" within the meaning of the FIFTH AMENDMENT?

The present record does not present a case (and the Government can not contend that it does) where property has been taken or de-

*It will be observed that *no* claim is made here on account of the depreciation of the distillery plants or on account of any property, the use of which has been restricted. The claim here relates solely to the fact that the actual physical whisky is either held by the Government in the case of the bonded goods, or, in the case of floor stock, its sale by the owner is absolutely prohibited.

stroyed in the course of the actual conflict of war. For such losses there is no compensation. See *U. S.* v. *Pacific R. R. Co.,* 120 U. S., 227; *Mitchell* v. *Mallory,* 13 How., 115, and *U. S.* v. *Russell,* 13 Wall., 623.) The doctrine of these cases is thus stated in *U. S.* v. *Pacific R. R. Co.:*

> "The destruction or injury of private property in battle or in the bombardment of cities and towns and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences."

What does the Act do?

Although the Kentucky Co. has expended over one million of dollars in the manufacture of this whisky and a large sum in the taxes it has been compelled by the Government to pay on part of the same, no provision whatever has been made for compensating the Company for this loss—not even for the taxes it was forced to pay to this very same Government.

The Act prohibits the Kentucky Co. from either (*a*) selling the whisky which it has in its own possession fully tax paid, or (*b*) obtaining possession of its property which is in the Government's bonded warehouses. This

ban, which has lasted since June 30, 1919, will continue until some undefined date in the future, when, according to the Government's contention, the Treaties of Peace with both Germany and Austria shall have been ratified by the Senate and the President shall have proclaimed demobilization terminated. In the meantime the EIGHTEENTH AMENDMENT was proclaimed by Acting Secretary of State Polk on January 29, 1919, to have been adopted. By its very terms, it expressly gives a year within which existing liquor might be disposed of (doubtless to meet the question reserved in *Bartemeyer* v. *Iowa,* page 10, *supra*). The effect of the War Prohibition Act is that the Kentucky Co. *has been deprived of every attribute of ownership,* except the necessity of paying taxes to the United States upon the very property which the Government refuses to allow the owner to use or sell. If this does not constitute a "taking" of a person's property, the English language has lost its meaning.

In *Buchanan* v. *Warley,* 245 U. S., 60, 74, 81, it was held that a city ordinance forbidding colored persons to occupy houses in blocks where the greater number of houses are

occupied by white persons, deprived an owner of his property without due process of law, in that it affected an essential element of property, to wit, impaired *the right of sale.* The Court said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes *the right to* acquire, use, and *dispose* of it. The Constitution protects these essential attributes of property. *Holden* v. *Hardy,* 169 U. S. 366, 391. Property consists of the free use, enjoyment, and *disposal* of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127. • • •
>
> The right which the ordinance annulled was the civil right of a white man to *dispose* of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person."

In *Wynehamer* v. *People, supra,* the court at page 387 said:

> "We must be allowed to know, what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage; that such has been their primary and principal use in all ages and countries; that it is this use which has imparted to them, in this state, more than ninety-nine hundredths of their commercial value."

And after continuing with the language quoted above at page 11, the Court on page 389 said:

> "As property, the right to sell them is denied and their commercial value is thus annihilated."

And on p. 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

And on page 398:

> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a Constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

In *Foster* v. *Scott*, 136 N. Y., 577, the Court said:

> "It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the *power of disposition at the will of the owner.*"

In *U. S.* v. *Cress*, 243 U. S., 316, and *U. S.* v. *Lynah*, 188 U. S., 445, where the construc-

tion of dams in a navigable river resulted in the overflow of lands, there was held to be a "taking" even if the overflow was only at certain times, which injured but did not destroy the value of the lands so overflowed.

The Kentucky Co. was required by Federal statute to provide, at its own expense, bonded warehouses, which were under the exclusive control of the Government. (*Taney* v. *Penn. Bank,* 232 U. S., 175; *Dale* v. *Pattison,* 234 U. S., 379.) By statute, it was also authorized to leave its whisky in bond for eight years, and to bottle it in bond at any time after the first four years.

The whisky in question was rightfully in the Kentucky Co.'s bonded warehouses and it had the right to rely upon the Bottling in Bond Statute, and furthermore it could not have bottled a large part of the whisky because it had not been in the warehouses four years at the time the War Prohibition Act was enacted.

It is therefore no answer to suggest that the Kentucky Co. should have withdrawn the whisky from bond and sold the same before the War Prohibition Act was enacted.

As the "taking" is solely under the war power, it is concededly for a "public use."

The final question is: Has "just compensation" been made? If not, what is the effect of the omission upon the validity of the Act?

In every other instance where Congress has authorized the taking or use of property for war purposes, the Act itself has provided that the owner shall receive "just compensation therefor" to be determined by the President, or, if that is not satisfactory to the owner, he shall receive 75 per cent of the President's award, and is entitled to sue the United States for the balance claimed.* Indeed, in another

*Acts of	Citation	Authorizing the seizure or requisition of
March 4, 1917	39 Stat., 1192	Factories, ships and war materials.
July 1, 1918	40 Stat., ...	
June 15, 1917	40 Stat., 182	Street railroads, equipment, etc., and the acquisition of title to land, plants, etc.
April 22, 1918	40 Stat., ...	
Nov. 4, 1918	40 Stat., ...	
Aug. 10, 1917 (Food Control Act)	40 Stat., 279	Foods, fuels, factories, packing houses, coal mines, coal supplies, etc.
Mar. 21, 1918	40 Stat., ...	Railroads.
May 16, 1918	40 Stat., ...	Houses, buildings, properties, etc., in District of Columbia.
June 4, 1918	40 Stat., ...	
July 18, 1918	40 Stat., ...	Ships.
July 16, 1918	40 Stat., ...	Telephone and telegraph systems.
October 5, 1918	40 Stat., ...	Mines, mineral lands, etc.
Nov. 21, 1918	40 Stat., ...	Buildings.
March 4, 1919	40 Stat., ...	Certain facilities.

See, also, Act of June 3, 1916 (39 Stat., 213) for the mobilization of industries, which authorizes the seizure of munition plants and provides that the compensation therefor shall be "fair and just," and the Act of March 4, 1917 (39 Stat., 1169), authorizing the acquisition of aeroplane patents by condemnation, for which $1,000,000 was appropriated.

section of this very War-Time Prohibition Act of November 21, 1918, the requisition of buildings for the Agricultural Department is authorized, and the Secretary of Agriculture is directed to "ascertain and pay just compensation for such use"; and if the amount so fixed is not satisfactory to the owner, he shall receive 75 per cent thereof at once, and may sue for the balance claimed.

It is thus obvious that Congress fully realized the necessity of making adequate provision for just compensation in every other case where it interfered with anyone's property or his use thereof.

But when under "the clamor of an excited people" Congress determined to deal with whisky, the time had arrived, as warned in *Ex parte Milligan*, 4 Wall., 2, 119, 120,

> "when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper";

and so no provision for any compensation was made. But, on the contrary, Congress shortly thereafter (February 24, 1919) imposed a heavy retroactive tax (double the then existing tax) on all whisky, including that already tax

paid; the tax was assessed and collected; and the owners are now prohibited from selling the very whisky on which they have paid that tax, a large part of which the Kentucky Co. was compelled to pay as late as September 24, 1919.

The Government contends that under the power to declare war there were conferred upon Congress those powers commonly called the "Police Powers" of the States, and the Government argues that because the States can prohibit the sale of liquor without making any compensation therefor, Congress can do likewise.

There are several answers to this contention:

(1) In the exercise of war powers there is not conferred upon Congress any police power, but there is merely exercised by Congress the all-embracing war power. It is in no sense a police power, but essentially a war power, and, as such, subject to such other limitations upon congressional action as the Constitution imposes. It is a false analogy to say that under the war power Congress is endowed with what are commonly called the po-

lice powers of the states and consequently may exercise them as unlimitedly as do the States. But the police powers of the States are not subject to the FIFTH AMENDMENT, whereas the war powers of Congress are.

(2) It has never been decided by this Court (but the question has always been expressly reserved) whether even the states can, under their police power, prohibit the sale of liquor existing at the time of the passage of the statute. All the whisky involved in the present case was in existence long before the declaration of war. Therefore, even on the analogy of the States' police powers, such cases as *Mugler* v. *Kansas, Beer Co.* v. *Massachusetts,* and *Bartemeyer* v. *Iowa,* are inapplicable because they relate solely (1) to the prohibition of *future* manufacture and (2) to the sale or possession of liquor which was made *after* the passage of the statute.

(3) The FIFTH AMENDMENT is a direct limitation upon the war power; and any exercise of the war power is subject to its provisions. Nor can it be evaded by the suggestion that because the States (not being subject to the FIFTH AMENDMENT) can prohibit the manufacture and sale of subsequently acquired

liquor, Congress (all of whose powers *are* subject to the FIFTH AMENDMENT) can prohibit the sale of *pre-existing* stocks of liquor.

(4) The fallacy in the Government's argument is that because, under the reserved power of the States they always had the right to prohibit the liquor traffic, and under such power were not required to make any compensation for the incidental damage to brewery plants or distilleries which could no longer be used for their particular purpose, therefore, Congress under the war power possesses the same unrestricted rights.

While it is true that Congress' exercise of the war power can accomplish anything which the States can accomplish under their police power, yet the qualifications imposed thereon are different. So far as the Federal Constitution goes the States may require any bail they please, but Congress, even in the exercise of its war powers, is prohibited from requiring excessive bail. Again, under the police power, the States might even refuse a public trial or require in a criminal cause a person to be a witness against himself; but because Congress in the exercise of its war power can do anything necessary to win the war, Congress

is not relieved in the exercise of such powers, of the prohibition against self-incrimination or of the requirement for a public trial.

The instances might be multiplied where States are free in the exercise of their police powers, from requirements to which Congress, even in the exercise of its war power, *is* subject. The difficulty with the Government's argument is, that it ignores the limitations imposed by the FIFTH AMENDMENT upon the war power and simply assumes that what the States can do under the police power with regard to the manufacture or sale of liquor acquired *after* the passage of the prohibitory statute, Congress can also do, even as to *pre-existing* liquor. The conclusion does not follow from the premise, for three reasons:

(*a*) What the State can do as to liquor *subsequently acquired* is no argument as to what Congress can do with respect to liquor existing *before* the statute is passed;

(*b*) What the States, with unlimited police powers, can do for public purposes is no precedent as to what Congress can do.

(*c*) The exercise of war powers does not

place Congress in the same position as the States are with respect to their police powers.

The Kentucky Co. invokes, for its protection from arbitrary confiscation, those principles of constitutional liberty embodied in the FIFTH AMENDMENT, which in the *Milligan* case this Court so strongly upheld.

The law is abundantly settled that while the FIFTH AMENDMENT does not require that the "just compensation" shall be actually paid in advance of the "taking," nevertheless, the owner is entitled to some reasonable, certain and adequate provision for obtaining such compensation before his ownership or possession can be interfered with.

In *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S., 641, 658, it was held "just compensation" was sufficiently provided for when the act of condemnation stipulated that before entering upon the land, payment should be made into court of double of the amount of the award of referees appointed by the President; from which award either party might appeal to the courts. The court said:

> "It is further suggested that the act of Congress violates the Constitution in that it does not provide for compensation to be

made to the plaintiff *before* the defendant entered upon these lands for the purpose of constructing its road over them.

This objection to the act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner *is entitled to reasonable, certain and adequate provision for obtaining compensation* before his occupancy is disturbed."

In *Sweet* v. *Rechel,* 159 U. S., 380, 399, it was held that a state statute authorizing the condemnation of land was valid. The court said:

"But it is a *condition precedent* to the exercise of such power that the statute make provision for reasonable compensation to the owner."

After holding that the provisions of the Massachusetts Constitution and the Constitution of the United States were the same (p. 400) and reviewing several cases, the court said (p. 402):

"In view of these authorities, it is clear that as the Constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public, in the property taken or ap-

plied, become complete, the requirements of that instrument are fully met where the statute *makes such provision for reasonable compensation as will be adequate and certain in its results.* It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and *gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.*

SUBSTANTIALLY THE SAME PRINCIPLES HAVE BEEN ANNOUNCED BY THIS COURT WHEN INTERPRETING THE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES THAT FORBIDS THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION."

This Court stated that the constitutional requirement was (p. 402)

"that the owner of property shall have *prompt and certain compensation* without being subjected to undue risk or unreasonable delay";

and that a statute is valid when it

"recognizes the *absolute right* of the owner, upon his property being taken, *to just or reasonable compensation* therefor, and makes provision, in the event of the disagreement of the parties, for an ascertainment, by suit,

> *without unreasonable delay or risk* to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation."

The court recorded with approval the language in *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass., 394, 396, that

> "a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is *unconstitutional and void.*"

In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S., 557, 568, 569, the rule was said to be

> "that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid, and before any final determination thereof. * * * All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this is accomplished, there is that due process of law which is required by the Federal Constitution."

In *Crozier* v. *Krupp*, 224 U. S., 290, 306, the rule for making compensation under the FIFTH AMENDMENT was thus stated:

> "Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking—that is, that the amount should be ascertained and paid in advance of the appropriation—*it being sufficient*, having relation to the nature and character of the property taken, *that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation;* second, that, again always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled *by an assumption* on the part of government of the duty to make *prompt payment* of the ascertained compensation—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end."

The rule deducible from all the cases is that some provision must be made *in advance* for the compensation, although the money need not actually be paid in advance.

The FIFTH AMENDMENT would be but a flimsy protection if the Government could

take one's private property, leaving it to some future Congress to make provision for compensation. A citizen is not compelled to rely upon the whims and uncertainties of Congress, for receiving payment for his property which has been taken for public use.

The Government concedes that neither under the War Prohibition Act of November 21, 1918, nor under any general statute, is there any possible provision by which the owners of whisky can recover any compensation from the Government, either for the whisky itself or for the taxes heretofore paid upon it.

In conclusion, it is submitted that if instead of being whisky this had been cotton or steel, few would have had the hardihood to defend the validity of the act. But so far as Congress is concerned, the fact that the commodity in question is whisky is immaterial, as Congress has no reserved police power, by which under any supposed war emergency it can withdraw whisky from the protection of the FIFTH AMENDMENT.

Therefore, the Act of November 21, 1918 (having deprived the Kentucky Co. of the most essential attributes of private property,

namely, the rights of possession and sale, without making any provision for compensation for its loss, or reimbursement of the taxes paid thereon), was in excess of the power of Congress, in violation of the FIFTH AMENDMENT, and consequently void with respect to all whisky *which was in existence prior* to November 21, 1918.

THIRD POINT.

The War-Time Prohibition Act has, by its own terms, ceased to be operative.

First. The text of the act and its meaning.

The act declares that

> "for the purpose of *conserving the man power* of the Nation and to *increase efficiency in the production* of arms, munitions, ships, food and clothing for the Army and Navy"

it shall be unlawful after June 30, 1919, to sell liquor

> "until the conclusion of the present war and *thereafter* until the *termination of demobilization*, the date of *which* shall be determined and proclaimed by the President of the United States."

The debates may be resorted to as a means of showing the environment at the time of its

enactment. (*Standard Oil Co.* v. *U. S.*, 221 U. S., 1, 150.)

The Anti-Saloon League wrote Senator Sheppard, the sponsor of the measure, as follows (Cong. Rec., Vol. 56, p. 9627):

> "We feel also that ample provision should be made for *continuing* the prohibition *during the period of demobilization*, which may be quite as important as during *actual hostilities.*"

Senator Sheppard concurred and inserted the words now under discussion and the following debate ensued (id., p. 9641):

> "MR. SHEPPARD. It was put in with a view to the probability that the war might end much sooner than we thought.
>
> MR. WADSWORTH. Oh! Then this is something more than war prohibition.
>
> MR. SHEPPARD. No; I consider the period of demobilization a part of the war. *It is the necessary aftermath of the war.*
>
> MR. WADSWORTH. The Senator has just said it was put in with the idea that the war might end a little sooner than was anticipated.
>
> MR. SHEPPARD. I meant by that the termination of *actual hostilities.*"

The evil sought to be remedied was the danger of intoxication by soldiers, sailors and war

workers during the war and during the subsequent period of demobilization.

Demobilization is defined thus in the Century Dictionary:

> "The act of disbanding troops; the reduction of military armaments to a peace footing."

In 18 Corpus Juris, 484, it is thus defined:

> "In military law, the dismissal of an army or body of troops from active service."

In the Congressional debates Senator WADSWORTH asked Senator SHEPPARD (the proponent of the measure) for

> "his understanding * * * of the meaning of this phrase; the termination of demobilization * * *"

and added:

> "As I understand it 'demobilization' in its ordinary sense is descriptive of the period of time following the war during which the soldiers of the recent belligerents shall have all been discharged and gone to their homes. Is that the understanding of the senator from Texas?"
>
> Mr. Sheppard: "All those who served for the particular period of this emergency, as I understand; all except the regular army."

All suggestions that "demobilization" as used in the War-Time Prohibition Act em-

braces other matters are both unsound and illogical.

At the threshold, we are met by a question of mere grammatical construction. Do the words "date of which" refer only to "termination of demobilization," or do they also qualify the "conclusion of the present war"? Without now stopping to inquire which is the correct interpretation, it will be sufficient to consider the language in both aspects.

(*a*) If the act means that no liquor can be sold until the President shall determine and proclaim "the date" both of the "conclusion of the present war" and *thereafter* of the "termination of demobilization," then we have the following acts by the President, which would indicate that he has done precisely what the act stipulated he should do.

On November 11, 1918, the President in pursuance of his constitutional duty to "give to the Congress information of the state of the Union" addressed a joint meeting of both Houses, summarized the terms of the Armistice, and said:

> "*The war thus comes to an end;* for having accepted these terms of armistice, it will

be impossible for the German Nation to renew it. * * *

It is not now possible to assess the consequences of this consummation. *We know only that this tragical war* whose consuming volume swept from one nation to another until all the world was on fire *is at an end.*"

That he considered the war concluded is shown by his subsequent actions.

On June 28, 1919, the President signed the Treaty of Peace with Germany.

On July 10, 1919, he presented the Treaty to the Senate and formally declared to the Senate that

"*the war ended* in November eight months ago."

Do not these declarations constitute such a determination and proclamation of the "conclusion of the present war" as to satisfy the statute, if required at all?

How could the declaration be more formal or solemn than by an official communication to the Congress which had imposed this duty upon him? (*U. S.* v. *Hicks,* 256 F. R., 707, 710, 713.)

The demobilization process has continued steadily until the strength of both the Army

and Navy has been reduced to less than the authorized peace quota. The production of war munitions has stopped, all existing contracts have been canceled and the Government is actively disposing of its surplus war supplies of arms, munitions, food and clothing, etc.

On September 30, 1919, the War Department officially declared that

> "in general the accident of war and *the progress of demobilization are at an end.*"

On October 27, 1919, the President, in vetoing the Volstead Bill which sought to enforce the War-Time Prohibition Act, stated that the objects of the latter

> "have been satisfied *in the demobilization of the Army and Navy* and whose repeal I have already sought at the hands of Congress."

On November 11, 1919, GEN. PERSHING in an Armistice Day announcement to the people of the United States said:

> "*Our armies have been demobilized* and our citizen soldiers *have returned again* to civil pursuits with the assurance of their ability to achieve therein the success they attained as soldiers."

On pages 11-13 of the Record there are set

forth in great detail the resumption of trade and commerce, the lifting of all restrictions, and censorship of every kind.

If, then, the true interpretation of the act is, that the cessation of its prohibitions depends upon the President's determination and proclamation of (1) the conclusion of the war and (2) the termination of demobilization, it would seem clear that the President has done those very things.

(*b*) The Government may contend that Presidential action is only required with respect to the "termination of demobilization"; and that the "conclusion of the present war" will not occur until the final ratification of the treaties of peace with Germany and Austria.

That contention requires us to determine the meaning of the phrase "conclusion of the present war" as used by Congress in this particular statute. When it is remembered that the purpose of this act was not to affect international relations, nor to define the rights of aliens, nor to prescribe a definite date from which to measure limitation statutes, but was solely to protect soldiers, sailors, and munition workers from intoxication while in, or work-

ing for, the Army and Navy, we see the inapplicability of such cases as *Hijo* v. *United States,* 194 U. S., 315, 323, which held that the Spanish War did not cease until the ratification of peace.

By the use of the expressions

> "until the conclusion of the present war" and "*thereafter* until the termination of demobilization"

Congress showed that the end of the war *it* had in mind was one which must necessarily *precede* demobilization. Congress never could have intended or contemplated that there would or could be a "termination of demobilization" while the war was on. The natural and necessary sequence of events would forbid such a situation. As demobilization is now confessedly completed, the "conclusion of the present war" to which Congress referred *must have already* occurred.

That Congress purposely did not intend to make the "conclusion of the present war" dependent upon any treaty of peace is illustrated by a comparison of the language of this act with that of other war legislation wherein the "end of the war" was involved.

Whenever in the course of its recent war

legislation Congress intended an act to continue in effect until the technical (*de jure*) termination of the war by treaty of peace, it said so in plain language, as for example, "within one year from the signing of a treaty of peace with the Imperial German Government" (Aircraft Act of July 9, 1918); "during the continuance of the present war and for six months after the termination of the war by proclamation of the treaty of peace" (Departmental Reorganization Act of May 20, 1918); "six months after a final treaty of peace shall be proclaimed between this Government and the German Empire" (Act of March 4, 1917, concerning placing of orders for ships, war materials, etc., as amended July 1, 1918, and acts of November 4, 1918, April 22, 1918, and June 15, 1917); "upon proclamation of the final treaty of peace between the United States and the Imperial German Government" (Act of July 18, 1918, providing for the requisition of water carrier facilities); "one year and nine months next following the date of the proclamation of the President of exchange of ratifications of the treaty of peace" (Railroad Control Act of March 21, 1918). "The words 'end of

the war,' as used herein, shall be deemed to mean the date of the proclamation of exchange of ratifications of the treaty of peace" (Food Control Act of October 6, 1917). "Whenever said war shall cease by the conclusion of peace between the United States and its enemies in the present war the President shall so declare by a public proclamation" (Trading with the Enemy Act of June 15, 1917). "The term 'termination of the war' as used in this act shall mean the termination of the present war by treaty of peace as proclaimed by the President" (Soldiers and Sailors Relief Act of March 8, 1918). "Until the treaty of peace shall have been definitely concluded between the United States and the German Government" (Saulsbury resolution of May 31, 1918, respecting remedies of landlords).

In the War-Time Prohibition Act, Congress deliberately departed from its accustomed phraseology and used language specially adapted to the particular matter in hand. It intended war-time prohibition to continue until (1) the war should have been concluded in the ordinary acceptance of the term and (2) *thereafter* until the soldiers and sailors should have been returned into civil life, which is what was

meant by the phrase "termination of demobilization." It would be doing great violence to the language of the act to hold that although demobilization was terminated the war was not yet concluded and that it was still the intention (even if it had the power which it has not) of Congress to keep alive "prohibition" for the protection of an Army and Navy that had been completely demobilized and no longer existed.

A foreign war may not be terminated in respect of various considerations arising under international law and yet be concluded in respect of the rights and duties of citizens of the United States under the Federal Constitution; and it does not follow that because a technical state of war still prevails between the United States, Germany and Austria, notwithstanding the complete demobilization of our Army and Navy, the constitutional rights of the citizens of the United States are to be tested as if war actually existed. It is not necessary that there should ever be a definite treaty of peace. Can it be reasonably contended that in the absence of such treaty Congress might ten years hence exercise as war

powers those which in no other way have been conferred upon it?

The return to normal conditions set forth in detail in the Record, pp. 11-13, shows that there is no longer any shadow of an excuse in fact for the continued exercise of this extraordinary war power of Congress. How is the continuance of prohibition *after* the demobilization of the Army and Navy adapted to the successful prosecution of the war?

War may be terminated in either of three ways, viz.: (1) by a cessation of hostilities on both sides, (2) by conquest and subjugation, or (3) by a treaty of peace.

History presents many instances where there has been a "conclusion of war" without any treaty of peace, the principal difficulty in such cases being that questions might arise (a) as to commercial intercourse between the subjects of the former warring powers, and (b) as to the relationship between the Governments and third Governments with respect to obligations of neutrality. Whether or not war has been terminated, is, after all, a question of fact to be determined in each case by the situation presented. Mr. Seward, while Secretary

of State, announced the true rule in his letter to the Spanish Minister, dated July 22, 1868, when he said:

> "It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances." (Diplom. Corr. 1868, Vol. 2, pages 32, 34.)

With regard to the affairs of Spain and Chile, he maintained that if either power claimed that war between them still existed—seeing that active hostilities had long ceased—it would be obliged to substantiate its claim, saying:

> "Peru, equally with Spain, has as absolute a right to decline the good offices or mediation of the United States for peace as either has to accept the same. The refusal of either would be inconclusive as an evidence of determination to resume or continue the war. It is the interest of the United States, and of all nations, that the return of peace, however it may be brought about,

shall be accepted whenever it has become clearly established. Whenever the United States shall find itself obliged to decide the question whether the war still exists between Spain and Peru, or whether that war has come to an end, it will make that decision only after having carefully examined all the pertinent facts which shall be within its reach, and after having given due consideration to such representations as shall have been made by the several parties interested."

While it is desirable that a formal declaration of the resumption of peace shall be made by belligerents in order that their subjects may know when they are entitled to recommence commercial intercourse with each other, and that third States may know when they cease to be neutrals, yet in the present case the subjects of Germany and the United States have already recommenced complete commercial intercourse with each other, and, so far as we are aware, all third States are now treated as no longer neutrals nor do the rules governing neutrality apply, for example, to such nations as Sweden and Norway.

In 1720 the war between Spain and France was terminated by the mere withdrawal of their respective forces; in 1801 the Russian war with Persia begun by Catherine II. was

ended by Paul I. by each side withdrawing their forces. In the war between Spain and her revolted South American colonies, hostilities ceased in 1825, although no technical state of peace was formally established until twenty years later. It was twenty years after Venezuela, Ecuador and Chile secured their respective independence before Spain formally acknowledged the fact. Yet, during that period the war had certainly been concluded and third nations no longer considered themselves neutrals.

In the war of 1866 Prussia neither reduced to submission nor concluded peace with the principality of Lichtenstein, but peace between them was simply recognized as a fact.

In 1867 the war between France and Mexico came to an end by the withdrawal of French troops under pressure by the United States, but it was thirteen years before reconciliation was signalized by a diplomatic instrument and nearly twenty years before a treaty was entered into, although in the meantime they had agreed to waive their respective claims and Mexico had appointed commercial agents in France.

Conversely war may be in full force when a treaty of peace is signed. For example, in the Russo-Japanese war, the armies were in furious conflict while the peace conferences were being held at Portsmouth; and after the signature of the treaty of Portsmouth on September 5, 1905, it was ten days later before the commanders in the field suspended actual hostilities.

In *United States* v. *Hicks,* 256 Fed., 707, the court, in construing the words "during the present war," held that the present war had ended by December, 1918, within the meaning of that statute, saying:

> "The authoritative publications show that, while war is usually terminated by a treaty of peace, and that such treaty is the best evidence of such termination, history shows many instances in which wars were terminated without any treaty at all. * * * The public is oftentimes, perhaps generally, notified of treaties by official proclamation. But there is no prescribed form for such latter documents, and at last they are but official announcements of a state of fact. The President's official communication to Congress met all the conditions of an official proclamation, so far as such documents are designed for giving information. * * *
>
> Again, the President's official statement

was either true or it was mere rhetorical optimism. This court is by no means at liberty to yield to the latter alternative, for it is clearly of opinion, in view of current public history, that the President's statement was, in fact, correct when made, even if an agreed upon treaty of peace has been delayed in the making."

Second. The War-Time Prohibition Act has become obsolete.

The question is whether or not this act *now* sought to be applied against the Kentucky Co. does or does not violate its constitutional rights *at the present time*.

The Rate cases are a strong example of laws which may be valid at the time they are passed but which, on account of changing conditions become at a later date inapplicable.

See *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S., 256, 269; *Minnesota Rate Cases*, 230 U. S., 352, 473; *Missouri Rate Cases*, ib., 474, 508; *Willcox* v. *Consolidated Gas Co.*, ib. 19, 54.

This Court has clearly enunciated this doctrine in *Johnson* v. *Gearlds*, 234 U. S., 422, 446, and *Perrin* v. *United States*, 232 U. S., 478, 486. In these cases the court passed upon

the right of Congress to prohibit the sale of intoxicating liquor to Indians in the Indian Territory or within the boundaries of a state In the *Perrin* case the court said, at p. 486:

> "As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis, Thus, a prohibition like that now before us, if covering an entire State when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control. *A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State.* * * *
>
> The fact that the conditions may become so changed in the future as to render the prohibition inoperative affords no reason for condemning it now. Unless sooner repealed, it will continue in force as long as the presence and status of the Indians sustain it as a Federal regulation."

In *Johnson* v. *Gearlds, supra*, the court restated the rule and continued:

> "We do not mean to say that if it appeared that no considerable number of Indians remained wards of the Government within the territory in question, the courts would not be justified in declaring that since the constitutional warrant for the restriction no longer existed the restriction must expire with it."

The complete demobilization of the armed forces, the abandonment of all war production, the disposition of existing war supplies and the resumption of every kind of peace time intercourse with the enemy, all show that the emergency which alone could call into being the power of Congress over liquor sales within a State, has wholly passed. Therefore the Act is no longer operative.

LEVY MAYER,

WM. MARSHALL BULLITT,

Counsel for Appellee.

November 20, 1919.